No. 92-1510-CFX
Status: DECIDED

Docketed:
March 8, 1993

Title: Michael J. Cavanaugh, Executive Director, South Carolina Department of Probation, Parole and Pardon Services, et al., Petitioners
v.
Gary Lee Roller

Court: United States Court of Appeals for the Fourth Circuit

Counsel for petitioner: Medlock,T. Travis

Counsel for respondent: Fairey,W. Gaston

40 cps ptn rcd 3-8-93, 1 retained; 39 corr cps rcd 3-17-93.

Entry	Date	Note	Proceedings and Orders
18	Nov 8 1992		ARGUED.
1	Mar 8 1993	G	Petition for writ of certiorari filed.
2	Apr 14 1993		Brief of respondent Gary Lee Roller in opposition filed.
3	Apr 14 1993	G	Motion of respondent for leave to proceed in forma pauperis filed.
4	Apr 21 1993		DISTRIBUTED. May 14, 1993
6	May 17 1993		REDISTRIBUTED. May 21, 1993
7	May 24 1993		Motion of respondent for leave to proceed in forma pauperis GRANTED.
8	May 24 1993		Petition GRANTED.
			**********
9	Jun 11 1993	G	Motion of respondent for appointment of counsel filed.
10	Jun 28 1993		Motion for appointment of counsel GRANTED and it is ordered that W. Gaston Fairey, Esquire, of Columbia, South Carolina, is appointed to serve as counsel for the respondent in this case.
11	Jul 6 1993		Joint appendix filed.
12	Jul 6 1993		Brief of petitioners Michael J. Cavanaugh, et al. filed.
13	Jul 30 1993		Record filed.
		*	Certified record proceedings U.S. Court of Appeals, Fourth Circuit and U.S.District Court, South Carolina.
14	Aug 5 1993		Brief of respondent Gary Lee Roller filed.
17	Sep 8 1993	X	Reply brief of petitioners filed.
15	Sep 9 1993		CIRCULATED.
16	Sep 10 1993		SET FOR ARGUMENT MONDAY, NOVEMBER 8, 1993. (3RD CASE).
19	Nov 8 1993		ARGUED.
20	Nov 30 1993		Writ of certiorari DISMISSED as improvidently granted. Opinion per curiam.

92-1510

Supreme Court, U.S.
FILED
MAR 8 1993
OFFICE OF THE CLERK

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

MICHAEL J. CAVANAUGH, EXECUTIVE DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE,AND PARDON SERVICES; SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES,
Petitioner

versus

GARY LEE ROLLER,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I.

WAS FEDERAL JURISDICTION FOR ROLLER'S CHALLENGE OF SOUTH CAROLINA'S PAROLE RELEASE SYSTEM PROPER UNDER 42 U.S.C. §1983, OR WAS THE PRISONER'S PETITION ONE WHICH THE COURT OF APPEALS SHOULD HAVE HELD REACHED THE VERY "CORE OF HABEAS CORPUS" AND, AS SUCH, REQUIRED THE PETITIONER TO EXHAUST HIS REMEDIES IN THE STATE COURTS OF SOUTH CAROLINA BEFORE PROCEEDING TO THE FEDERAL COURTS?

II.

IS THE 1986 STATUTORY AMENDMENT TO THE SOUTH CAROLINA CODE, WHICH INCREASES THE TIME BETWEEN PAROLE RECONSIDERATION HEARINGS FROM ONE TO TWO YEARS FOR OFFENDERS CONVICTED OF VIOLENT CRIME, AN INSUBSTANTIAL PROCEDURAL CHANGE OUTSIDE THE PURVIEW OF THE EX POST FACTO CLAUSE, AS THE SUPREME COURT OF SOUTH CAROLINA

HELD IN GUNTER V. STATE, 378 S.E.2d 443 (1989), OR IS THE AMENDMENT ONE WHICH AFTER THE FACT WORKS A CHANGE OF SO GREAT A MOMENT THAT THE LAW AS APPLIED TO THE PETITIONER VIOLATES THE PROHIBITION AGAINST EX POST FACTO LAWS?

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STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOKED

Pursuant to the requirements set forth in S.Ct. Rule 14.1(e), Appellant, the State of South Carolina, shows the following:

(i) The date of entry of the judgment of the United States Court of Appeals for the Fourth Circuit for which the Appellant seeks review is January 15, 1993.

(ii) The date of the Fourth Circuit's order staying the mandate to the United States District Court for the District of South Carolina is February 5, 1993. The order granted South Carolina's motion to say the Fourth Circuit's mandate until March 8, 1993.

(iii) Not applicable.

(iv) The Appellant believes that jurisdiction is conferred on the United States Supreme Court by 28 U.S.C. §1254(1) and 28 U.S.C. §1257(a), as characterized in Supreme Court Rule 10.1(a). The former statute allows this Court to review, upon petition for writ of certiorari, cases in the courts of appeals, before or after judgment has been rendered. The latter statute allows the Court to review, also upon petition for writ of certiorari, final judgments rendered by the highest court of a state in which a decision could be had, where the validity of a state statute is being drawn in question on the ground of its being repugnant to

the Constitution. In this matter, South Carolina Code §§16-1-60 and 24-21-645, are being drawn in question on the ground that their application to Appellee Roller violates the Ex Post Facto Clause. Further, Rule 10.1(a) indicates that the Court is likely to consider a matter of such character as this one, in which a United States court of appeals has decided a federal question in a way that conflicts with a state court of last resort. The Fourth Circuit's decision squarely conflicts with the South Carolina Supreme Court's decision in Gunter v. State, 298 S.C. 113, 378 S.E.2d 443 (1989), on the ex post facto question; and on the threshold question of federal jurisdiction

under 42 U.S.C. §1983, it conflicts with this Court's decision in Preiser v. Rodriguez, 411 U.S. 475 (1973), and its line.

CONSTITUTIONAL PROVISIONS AND STATE STATUTES INVOLVED IN THE CASE

U.S. Const. art. I, §9, cl. 3.

No. . .ex post facto law shall be passed.

U.S. const. art. I, §10, cl. 1.

No state shall. . .pass any. . .ex post facto law. . . .

S.C. Code Ann. §16-1-60 (1976), as amended

For purposes of definition under South Carolina law a violent crime includes. . .voluntary manslaughter. . .

S.C. Code Ann. §24-21-645 (1976), as amended

. . .

[U]pon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole.

S.C. Code Ann. §24-21-650 (1976), as amended

. . .Upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole.

1981 S.C. Acts 100 codified as S.C. Code Ann. §24-21-620 (1976)

. . .Upon a negative determination, the prisoner's case shall be reviewed every twelve months thereafter for the purpose of such determination.

STATEMENT OF THE CASE

The Respondent, Gary Lee Roller, was convicted in the Chester County Court of General Sessions for the crimes of voluntary manslaughter and grand larceny. Both crimes were committed on December 13, 1982. Roller was sentenced on March 25, 1983, to serve thirty years for the voluntary manslaughter and a consecutive sentence of five years for the grand larceny. On October 27, 1990, Roller became eligible for parole under the parole eligibility statute in force on December 13, 1982, the date he committed his crimes. That parole eligibility date has not changed. Roller was heard for parole on October 31, 1990, and parole was denied. According to the procedures set up by the Parole Board, Roller was duly informed in writing of his rejection

and the reasons for it. He was also notified that his next parole hearing would be scheduled on or about October 31, 1992, two years following his rejection, pursuant to the law in effect at the time of his initial parole hearing. S.C. Code Ann. §§24-21-645 and -650 (1976) as amended.

When Roller committed his crimes, the procedural law governing the rescheduling of parole hearings following a rejection set the time at one year. S.C. Code Ann. §§24-21-620, (1976), as amended. Effective June 3, 1986, the law controlling the rehearing procedure was changed to require a two-year period between parole hearings for violent offenders. At the same time, the South Carolina General Assembly enacted §16-1-60, which enumerated those crimes deemed to be violent and included in that

enumeration the crime of voluntary manslaughter. The punishment for voluntary manslaughter, however, remained exactly what it had been when Roller committed that crime in 1982. The South Carolina Supreme Court ruled in Gunter v. State, 298 S.C. 113, 378 S.E.2d 443 (1989), that the decrease in the frequency of parole hearings for violent offenders was a permissible procedural change and did not violate the ex post facto clause of the Constitution.

JURISDICTION

Roller originally brought suit under 42 U.S.C. §1983 in the United States District for the District of South Carolina in December of 1990. On September 10, 1991, the United States Magistrate issued his Report and Recommendation on the parties motions for Summary Judgment. In an Order dated November 1, 1991, the

District Court adopted the Magistrate's Report and Recommendation granting the State of South Carolina's Motion for Summary Judgment. Roller initiated an appeal to the Fourth Circuit Court of Appeals. By an Order dated January 1993, the Fourth Circuit Court of Appeals reversed the District Court. In February 1993, the Fourth Circuit granted the Petitioner's motion to stay the mandate until March 8, 1993. The Petitioner seeks a Writ of Certiorari to review the Fourth Circuit Court of Appeals' decision of January 15, 1993, which conflicts with the decision of the South Carolina Supreme Court in Gunter v. State, on the ex post facto question, and with this Court's decision in Preiser v. Rodriguez, 411 U.S. 475, 36 L.Ed.2d 439, 93 S.Ct. 1827 (1973) on the threshold question of federal jurisdiction under 42 U.S.C.

§1983.

I.

FEDERAL JURISDICTION FOR ROLLER'S CHALLENGE OF SOUTH CAROLINA'S PAROLE RELEASE SYSTEM WAS NOT PROPER UNDER 42 U.S.C. §1983, AND THE FOURTH CIRCUIT ERRED IN HOLDING IT WAS. THE PRISONER'S PETITION REACHES THE VERY "CORE OF HABEAS CORPUS" AND, BECAUSE IT DOES, IT REQUIRES THE PETITONER TO EXHAUST HIS REMEDIES IN THE STATE COURTS OF SOUTH CAROLINA, BEFORE PROCEEDING TO THE FEDERAL COURTS.

Section 1983 is not available to test the application of the challenged parole law. The action is cognizable only in habeas corpus. Preiser v. Rodriguez, 411 U.S. 475 (1973), states the rule that controls here:

> [W]e hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he

> seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus. [emphasis added]

Id. This holding forecloses Appellee's §1983 action here. Preiser also teaches that "a §1983 is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody." Id. at 499. The District Court relied on Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978), which incorrectly interprets Preiser. The Fourth Circuit held in Strader that Preiser stands for the proposition that "§1983 may be used to challenge parole procedures" only when the prisoner seeks "consideration for parole." Relying thus on Strader, the District Court is then able to conclude that Roller's use of §1983 is proper

because he "does not say he is entitled to parole."

Roller may not in so many words say he is entitled to parole, but that is what his lawsuit is all about. However loudly Roller may protest to the contrary, he must be challenging either the fact or the duration of his physical imprisonment, and the relief he seeks amounts to a determination that he is entitled to a speedier release from that imprisonment. He has made no allegations challenging the fact of his imprisonment, so that leaves the duration of his imprisonment as the only other possibility. (It needs no argument that Roller is not challenging the conditions of his prison life. That never was an issue.) And it does no good for Roller to insist that he is only "seeking his statutory parole hearing and not his

release." Appellee is at great pains to build his ex post facto argument on the major premise that the extra year between parole reconsideration hearings increases "the severity of his punishment" because this extra year, by Roller's own assertion, "increases the minimum amount of time the prisoner serves incarcerated." Whatever Roller wants to call it, the undeniable import of his argument amounts to nothing less than a challenge of the duration of his physical imprisonment.

Roller cannot have it both ways. Either he is challenging the increase in the duration of his sentence as constituting an ex post facto violation when applied to him, in which case the action lies solely in habeas corpus (Preiser, 411 U.S. at 500) and must be played out in the South Carolina state courts. Or he is

not challenging that increase, in which case it is a mystery just what he might be challenging as the retroactive disadvantage supposed to be substantial enough to violate the Ex Post Facto Clause.

Assuming Roller is not engaging in mystery, it is clear that the core of his ex post facto challenge, which attacks some retroactively applied decrease in the frequency of parole consideration hearings, is a challenge to future confinement in order to obtain an earlier release. To call it anything else is semantic subterfuge. The Fourth Circuit itself has said as much in two cases coming after Strader and interpreting Preiser. Section 1983 may not be used in place of habeas corpus, as a way of getting around the Writ's requirement that the Petitioner first exhaust his

state remedies. Leonard v. Hammond, 804 F.2d 838 (4th Cir. 1986); Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1982).

Insofar as Strader ignores all this, it simply gets Preiser wrong. And in so doing, Strader needlessly compounds the problem, already "difficult enough," Hamlin v. Warren, 664 F.2d 29, 33 (4th Cir. 1981) (Winter, C.J. dissenting), cert. denied, 455 U.S. 911 (1982), confronting state and federal courts alike: How to sort through the frustrating conflict between the civil rights and habeas corpus remedies for state prisoners. The heart of this conflict and, more important, how we finally resolve the conflict, implicates our deepest concern for and understanding of certain fundamental notions of federalism and all that that bedrock principle entails in the way of comity

between the federal government and the several states. To rely on Strader, we believe, undermines federalism and upsets the delicate balance which comity helps to keep. Braden v. 30th Judicial Circuit of Kentucky, 410 U.S. 484 (1973) (exhaustion of state-court remedies ensures comity between federal and state courts). For, what Strader suggests is that South Carolina's right to exercise concurrent jurisdiction with the federal courts in deciding questions of federal constitutional law need not be accorded the full respect that federalism says is its due, and may in fact be ignored altogether whenever a state prisoner, crafty enough to capitalize on the confusion now troubling the federal courts, renames his habeas corpus petition a §1983 claim for relief.

The Court should also recognize that

there is a further obstacle in the limitations on suits against the states imposed by the Eleventh Amendment. As this Court stated in the leading case of Will v. Michigan Dept. of State Police, 109 S.Ct. 2304, 2309 (1989), "Section 1983 provides a federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." The Eleventh Amendment, as the Court put it, "bars such suits unless the State has waived its immunity." Id. And South Carolina, we would assure the Court, has never waived its immunity here. Further, although Will suggests that an action against a state official in his official capacity for prospective injunctive relief under §1983 is proper because such an action would not be

treated as an action against the state, the suggestion doesn't fit the case here. Id. at 2311, n.10. What Roller is challenging is not the official capacity action of a state official; what he is challenging is the system South Carolina has set up for reviewing paroles after a rejection. The difficulty in relying on Strader is thus complicated. And the only way out for the Court, we would suggest, is for the Court to overrule the Fourth Circuit's reliance on Strader in favor of the lucid reasoning expressed in Preiser and well followed by the Fourth Circuit in Todd and Leonard.

Finally, it is crucial for the Court to remember that South Carolina has in place adequate state-law remedies--the Uniform Post-Conviction Procedure Act, §17-27-10 et seq. and the Tort Claims Act, §15-78-10 et seq.--that have always

been available to Roller. He need only have availed himself of those remedies, which he has chosen not to do. Instead, Roller resorts to the Civil Rights statute in order to circumvent the exhaustion requirements of the habeas corpus statute. For this Court to countenance such highjinks even for a moment would return us to the state of affairs that existed in 1971, before Preiser dealt with the problem. It was a state of affairs that led one judge of the Second Circuit to lament, "[s]tate prisoners are increasingly resorting to the Civil Rights statutes in order to circumvent the [exhaustion] requirements of [the habeas corpus statute]." Rodriguez v. McGinnis, 451 F.2d 730 (2d Cir. 1971). The reasoning that should guide the Court's deliberations here is first stated in Preiser. Certainly the

Fourth Circuit decision does serious harm to federal-state comity. South Carolina would therefore request the this Court grant its petition for a writ of certiorari to consider the federal questions that this case has raised.

II.

THE 1986 STATUTORY AMENDMENT TO THE SOUTH CAROLINA CODE, WHICH INCREASES THE TIME BETWEEN PAROLE RECONSIDERATION HEARINGS FROM ONE TO TWO YEARS FOR OFFENDERS CONVICTED OF VIOLENT CRIME, IS AN INSUBSTANTIAL PROCEDURAL CHANGE. IT IS OUTSIDE THE PURVIEW OF THE EX POST FACTO CLAUSE, AS THE SUPREME COURT OF SOUTH CAROLINA HELD IN GUNTER v. STATE, 378 S.E.2d 443 (1989).

The ex post facto question isn't as simple as Roller and the Fourth Circuit have made it out to be. The Fourth Circuit wrongly equates parole eligibility in South Carolina with parole reconsideration. Once this equation is made, it is but a short step to the conclusion that the statutory change in

question violates the ex post facto prohibition. It is a short step because the equation, albeit an erroneous one, puts the question squarely under the well-established rule that parole eligibility is a substantive matter and attaches to the punishment. Change parole eligibility retroactively and to the prisoner's disadvantage, and the prohibition against ex post facto laws is violated.

True enough. But the point is wholly irrelevant to the question here. In South Carolina, a prisoner becomes eligible for parole on his sentence only once; thereafter, he is reconsidered for parole every year (in the case of non-violent offenders) or every two years (in the case of violent offenders). See S.C. Code Ann. §24-21-645 (Supp. 1987). Roller's date of eligibility for parole

has not changed; that date was fixed from the start. See S.C. Code Ann. §24-21-610 (1976), as amended. What has changed is the procedure governing the interval between parole hearings after a rejection. For Roller that interval used to be one year; now it is two years. This is all that has been changed. No punishment has been added to Roller's original sentence after the fact. His sentence has not been lengthened. His parole eligibility has not been revoked or altered in any way. No "gain time" credits have been lost retroactively. As the Supreme Court of South Carolina found in Gunter v. State, 298 S.C. 113, 378 S.E.2d 443 (1989), "the standards governing petitioner's parole eligibility have not been changed. Instead, only the frequency with which petitioner can be reconsidered for parole has been

altered." The only change in Roller's situation is just this and nothing more --an insubstantial procedural change determining how frequently he will be reconsidered for parole.

South Carolina concedes that this change does operate to the prisoner's disadvantage, but it most certainly does not offend the Ex Post Facto Clause. Not all retroactive changes offend, a point well-established in the precedent of this Court:

> [T]he prohibition of ex post facto laws does not extend to every change of law that "may work to the disadvantage of a defendant." It is intended to secure "substantial personal rights" from retroactive deprivation and does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance."

Portley v. Grossman, 444 U.S. 1311, 1312 (1980), quoting Dobbert v. Florida, 432 U.S. 282, 293 (1977). See also, Miller v. Florida, 107 S.Ct 2446, 2451 (1987);

Beazell v. Ohio, 269 U.S. 167, 171 (1925); Hopt v. Utah, 110 U.S. 574, 590 (1884).

This Court reminds us in Collins v. Youngblood, 110 S.Ct 2715, 2719 (1990), that we must go back to the beginnings of ex post facto analysis, to clear the books of much of the confusion that has arisen in recent years. In Beazell v. Ohio, 269 U.S. 167, 46 S.Ct. 68 70 L.Ed. 216 (1925), this Court confidently summarized the general rule of ex post facto analysis, which had its beginning in Calder v. Bull, 3 Dall. 386 (1798):

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as ex post facto [citations omitted].

Collins, which goes back to Calder via Beazell, reminds us of the Court's own "original understanding" of the Ex Post Facto Clause. Id. at 2719. That original understanding rejects the notion--now increasingly current in some circuits, and among them, the Fourth Circuit, in particular--that any change which alters the situation of a party to his advantage violates the Ex Post Facto Clause. Id. at 2723. Collins emphasizes, in both its majority and concurring opinions, that the Ex Post Facto Clause "was intended to secure substantial personal rights against arbitrary and oppressive legislation." Id. at 2721 and 2727, quoting Malloy v. South Carolina, 237 U.S. 180, 183 (1915). Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition

"cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree." Collins at 2727, quoting Malloy.

The Fourth Circuit's reasoning leaves no room for this tried and true distinction. It leaves no room for case-by-case analysis of ex post facto problems based on the countless variations of fact these cases present. The Fourth Circuit's analysis reduces all levels of factual complexity to the lowest common denominator of simplicity: all changes in the law which operate retroactively to the disadvantage of the convicted criminal, no matter how slight, violate the prohibition against ex post facto laws. This is the inescapable implication of the Fourth Circuit's reasoning when it refuses to recognize the distinction between the facts

presented here and the facts presented in Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991), a case about which Roller makes much ado.

Whether the Fourth Circuit sees it or not, this case is distinct from Akins, and the distinction is based on an important matter of substance and degree, one which this Court should recognize under Collins v. Youngblood. As a matter of law and fact, the situation presented in Akins is vastly different from the situation here. In Akins, the interval between parole reconsideration hearings after a denial was increased from one year to eight years. This was even longer than it took to become eligible for parole in the first instance, which was seven years in Akins' case. The Eleventh Circuit equated the period between parole hearings with parole

eligibility itself. It did so on the basis of its finding that the Georgia legislature "considers a parole reconsideration hearing an essential and important part of parole eligibility." 922 F.2d at 1562. (At this point, it is important to emphasize, once again, that in South Carolina parole eligibility and parole reconsideration are statutorily two different things, separate and distinct.) And since parole eligibility is a part of the criminal punishment, it was then easy for the Akins Court to conclude that the change increased the punishment retroactively and therefore violated the prohibition against ex post facto laws.

South Carolina would not deny that even under its own parole system such a change as was at issue in Akins would violate the Ex Post Facto Clause.

Clearly, any increase of seven years, from one to eight years between parole reconsideration hearings, operates as a substantial disadvantage by denying the inmate a meaningful opportunity for a parole hearing. See Rodriguez v. U.S. Parole Commission, 594 F.2d 170, 174-175 (7th Cir. 1979). Such a degree of change is of sufficient moment to transgress the constitutional prohibition. This is how Collins would approach the Akins problem. Looking at the facts of the case at bar, Collins would say that nothing of the kind has occurred here. Roller has had, and still enjoys, every meaningful opportunity for parole under South Carolina's system of paroles. In fact, Roller was recently reconsidered for parole in October of 1992, though he was ultimately again denied it.

South Carolina has more freedom than

Georgia to experiment with changes in parole reconsideration, because South Carolina's parole laws do not make parole reconsideration an integral or essential part of parole eligibility, as do Georgia's parole laws. South Carolina should not lose its legitimate freedom to experiment with its parole system in the way that it has distinguished between parole reconsideration hearings for violent and non-violent offenders. South Carolina will lose a large part of that legitimate freedom to experiment if it is not given the chance to challenge the Fourth Circuit's opinion. This court has well recognized that the several states should be encouraged to develop their own parole systems and be allowed to experiment with ways of improving those parole systems. Greenholtz v. Inmates of Nebraska Penal and Correctional Complex,

442 U.S. 1 (1979). The Fourth Circuit's approach to ex post facto analysis, as evinced here, undermines this Court's wise concern for the right of every state to fashion its own parole system, leaving to each state as much freedom as possible under the federal constitution. The Court should grant South Carolina's petition and examine the Fourth Circuit's ex post facto analysis in this case. We think that the Court will find that on this question the Fourth Circuit is indeed very far out of line with the pronouncements of this Court.

CONCLUSION

South Carolina comes forward with this petition not only because it believes that it is right and the Fourth Circuit is wrong on the questions this case presents. South Carolina comes forward because it must also try to vindicate its

parole system of the constitutional censure laid up against it by the Fourth Circuit. For that censure, if allowed to stand, will certainly place an economic burden on South Carolina. If allowed to stand, the Fourth Circuit's opinion will force South Carolina to restructure the entire process for scheduling and hearing parole reconsiderations on all of its most serious, violent offenders who are in a position similar to that of the Appellee, Gary Lee Roller.

The Fourth Circuit's opinion has another bad effect. It discourages states from engaging in fair and wise experimentation with their parole procedures for fear of violating the Ex Post Facto Clause. And, by characterizing the prisoner's petition as cognizable under 42 U.S.C. §1983 instead of one properly coming under habeas

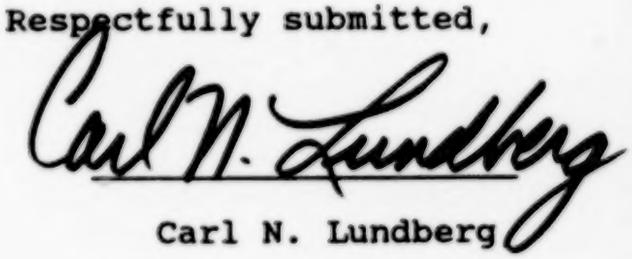
corpus and requiring exhaustion of state remedies in South Carolina, the Fourth Circuit did it in a way that ignores the real purpose of the prisoner's petition. Roller wants an earlier release. South Carolina has had its parole rescheduling procedure in place since 1986, and it has worked well over the years proving itself to be fair and efficient. Non-violent offenders, because they are less dangerous and may have shorter sentences, come up for parole reconsideration every year; violent offenders, because they are more dangerous and usually have longer sentences, are reconsidered every two years. This is a process based on good

sense, fairness, and wide experience with both success and failure.

South Carolina asks to be heard.

Respectfully submitted,

March 5, 1993



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PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 91-6688

Gary Lee Roller,
Plaintiff-Appellant

v.

Michael J. Cavanaugh, Executive Director of the South Carolina Department of Probation, Parole, and Pardon Services; South Carolina Department of Probation, Parole, and Pardon Services,
Defendants-Appellees

Appeal from the United States District Court for the District of South Carolina, at Columbia; Henry Michael Herlong, Jr., District Judge

(CA-90-3054-3-20-J)

Argued: December 3, 1992

Decided: January 15, 1993

Before RUSSELL and HALL, Circuit Judges, and MORGAN, United States District Judge for the Eastern District

of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Hall wrote the opinion, in which Judge Russell and Judge Morgan joined.

COUNSEL

ARGUED: W. Gaston Fairey, FAIREY & PARISE, P.A., Columbia, South Carolina, for Appellant. Carl Norman Lundberg, Chief Legal Counsel, SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES, Columbia, South Carolina, for Appellees. **ON BRIEF:** Edwin E. Evans, Chief Deputy Attorney General, Columbia, South Carolina, for Appellees.

OPINION

HALL, Circuit Judge:

Gary Lee Roller appals an order of the district court granting summary judgment for the defendants in Roller's 42 U.S.C. §1983 suit challenging the frequency of his parole reconsideration hearings. We must decide whether a statutory amendment increasing the length of time between parole reconsiderations from every year to every two years is an unconstitutional ex post facto law if applied to prisoners whose crimes were committed before the amendment. Concluding that it is, we reverse.

I.

In early 1983, Gary Roller was convicted of voluntary manslaughter and grand larceny in South Carolina state

court. Both of these crimes occurred on December 13, 1982. On March 25, 1983, he was sentenced to consecutive terms of imprisonment of thirty and five years. At that thime, a South Carolina statute provided that, within ninety days of the prisoner's becoming eligible for parole, the Parole Board would review the case and determine whether to grant parole. If the Board decided not to grant parole, "the prisoner's case shall be reviewed every twelve months thereafter for the purpose of such determination.' Former S.C. Code 24-21-620 (1976 & Supp. 1981). In 1986, this statute was amended to make reconsideration of parole for violent offenders less frequent -- every two years. S.C. Code §24-21-645 (1989 & Supp.

1991). The date at which a prisoner initially becomes eligible for parole, however, was not changed.

In 1990, Roller became eligible for parole. On October 31, 1990, the Board rejected parole, and advised Roller that his next hearing would be held October 31, 1992.[1]

On December 28, 1990, Roller filed this suit under 42 U.S.C. §1983 against the members of the Parole Board in their official and personal capacities. He sought monetary, declaratory, and injunctive relief. The gravamen of his claim was that application of the less-

[1] We were advised at oral argument that this hearing was held, and parole was denied.

frequent parole review to him violated the federal constitution's prohibition of ex post facto laws.

The defendants moved for summary judgment. The magistrate recommended that the motion be granted. Over Roller's objections, the district court adopted the magistrate's recommendation.

Roller appeals.

II.

A.

The district court held that Roller's official-capacity claims for damages were not cognizable under §1983, see Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), and that the defendants had

not overstepped their qualified immunity[2] so as to subject themselves to personal liability. See Harlow v. Fitzgerald, 457 U.S. 800 (1982). On appeal, Roller does not challenge these rulings. Because, however, prospective relief to stop unconstitutional practices by states is available in federal courts, Ex parte Young, 209 U.S. 123 (1908), Roller's claims for declaratory and injunctive relief are not affected by the defendants' immunities. Pulliam v. Allen, 466

[2] Because qualified immunity suffices to shield the defendants from personal liability, we need not decide whether the scheduling of parole reconsiderations is performance of a quasi-judicial function, for which the defendants would have absolute immunity. See generally, Forrester v. White, 484 U.S. 219, 225-229 (1988); Pope v. Chew, 521 F.2d 400, 405 (4th Cir. 1975).

U.S. 522 (1984).

B.

In 1973, in the midst of an unprecedented influx of civil rights suits by prisoners, the Supreme Court held that

> when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.

Preiser v. Rodriguez, 411 U.S. 475, 509 (1973). The defendants here argue that Roller is attacking a part of his sentence -- parole eligibility -- and §1983 does not provide relief. The Preiser distinction is important here because Roller has not exhausted his

state remedies on his ex post facto claim -- a general prerequisite to federal habeas corpus relief, but not to a §1983 suit.

In Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978), we held that §1983 was the proper vehicle for a defendant who sought to preclude a state parole board from considerating allegedly invalid prior convictions. Because the petitioner did not assert that he was entitled to parole, "now or ever," no exhaustion of the state habeas remedy was required. Like the inmate in Strader, Roller does not say he is entitled to parole. We follow Strader and find that Roller has stated a cognizable §1983 claim.

III.

A.

The Constitution prohibits both the federal and state legislatures from passing ex post facto laws. U.S. Const. art I, §9, cl. 3 and §10 cl. 1. Neither Congress nor the states may "enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then described.'" Weaver v. Graham, 450 U.S. 24, 28 (1981) (quoting Cummings v. Missouri, 4 Wall. 277, 325-26 (1867). Though there is no constitutional requirement that a state permit parole, a state may not [illegible] from

confinement, Greenholtz v. Inmates of Nebraska Penal & Correctional Complex, 442 U.S. 1 (1979), statutes providing for parole are "part of the law annexed to the crime at the time of the person's offense." Schwartz v. Muncy, 834 F.2d 396, 398 n.8 (4th Cir. 1987) (quoted in Fender v. Thompson, 883 F.2d 303, 305 (4th Cir. 1989).

The ex post facto clauses are a restriction on the power of government and operate without regard to the affirmative "rights" of the individual. Consequently, it is immaterial to an ex post facto challenge to computation of a release or parole eligiblity date that the prisoner does not have a "vested" liberty or property right in parole,

"good time," or the like. Weaver, 450 U.S. at 29-30 (criticizing state court for rejecting ex post facto claim by finding no "vested right" to good time credits).

The South Carolina Supreme Court has rejected a challenge identical to Roller's Gunter v. State, 298 S.C. 113, 378 S.E.2d 443 (1989).

B.

Four of our sister courts of appeals have directly addressed whether a retroactive reduction in the frequency of parole consideration violates the ex post facto clause. Three have held that it does, though the Ninth Circuit's opinion

was vacated on other grounds and is thus a nullity. Rodriguez v. United States Parole Comm'n, 594 F.2d 170 (7th Cir. 1979) (parole reconsideration changed from one-third point in sentence to every eighteen months; ex post facto clause violated as to a prisoner serving only a two-year sentence); Watson v. Estelle, 859 F.2d 105 (9th Cir. 1988), vacated, 886 F.2d 1093 (1989); Akins v. Snow, 922 F.2d 1558 (11th Cir.), cert. denied, 111 S.Ct. 2915 (1991); but see Bailey v. Gardebring, 940 F.2d 1150 (8th Cir. 1991), cert. denied, 112 S.Ct. 1516 (1992) (lead judge held that administrative rule was not a "law" subject to ex post facto clause; one judge concurred only in the result; the

third dissented).

In Akins, the Eleventh Circuit considered a Georgia statute that decreased the frequency of parole hearings from once a year to once every eight years. The court held that this change affected the substantive rights of persons who committed crimes before its enactment, and was not simply a "procedural change." The court reasoned:

> Since the [parole board] is required to hold some type of parole reconsideration hearing **before** granting parole, an inmate is effectively **ineligible** for parole between two reconsideration hearings. Because an inmate is not paroled without a

parole reconsideration hearing, the hearing must be considered an essential part of parole eligibility. 922 F.2d at 1562 (boldface in original).

The appellees cannot convincingly distinguish Akins. They concede that a seven-year increase in a prisoner's wait between reconsiderations is so long that it is substantive, but assert, "[a]s if you could kill time without injuring eternity,"[3] that a one-year wait is procedural" and presents no ex post facto difficulty. See Dobbert v. Florida, 432 U.S. 282 (1977) (ex post facto clause

[3] Thoreau, Walden; or, Life in the Woods, "Economy," reprinted in Walden and Other Writings by Henry David Thoreau 111 (Bantam Classic ed. 1981).

does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance").[4]

We are not willing to disparage the "substance" of a year, especially a year in prison.

Defendants also point out that Roller becomes and remains "eligible" for parole just as he would have under the law in effect when he committed his crimes. The defendants do not, however, identify any

[4] Cf. cases in which changes in the matter of reimposing sentence after the original sentence is set aside have been held to present no ex post facto problem. Collins v. Youngblood, 497 U.S. 37 (1990) (Texas statute allowing appellate court to reform illegal sentence); Evans v. Thompson,. 881 F.2d 117 (4th Cir. 1989), cert. denied, 110 S.Ct. 3255 (1990) (Virginia statute providing that capital defendants whose sentences are vacated may be resentenced before a new jury).

benefit flowing from the status of "eligibility" other than the right to be heard and considered for parole. Eligibility without consideration is a cold comfort.

This circuit has no case so directly on point as Akins; however, two cases provide us considerable guidance. In Schwartz v. Munoz, 834 F.2d 396 (4th Cir. 1987), the court reviewed a Virginia statute that increased the time before an inmate would become eligible for parole on existing sentence if the inmate committed a third offense after the statute's effective date. The court held that the statute increased the punishment for a crime completed before its enactment, and thus the statute violated

the ex post facto clause.

In Fender v. Thompson, 883 F.2d 303 (4th Cir. 1989), a state inmate was serving a life sentence. Under the state law in effect at the time of the crime, the inmate was eligible for parole after fifteen years. The state legislature later passed a law revoking the parole eligibility of inmates who escaped while serving life sentences. The inmate escaped after passage of the new law, and his eligibility for parole was revoked. We held that, though the state could punish escape in almost any manner it pleased, it could not do so by increasing the punishment for crimes committed before the new escape statute was enacted. We stated this general rule:

> [S]tatutes enacted or amended after a prisoner was sentenced cannot be applied to alter the conditions of or revoke his or her preexisting parole eligibility . . . .

883 F.2d at 306. South Carolina has undoubtedly applied its new statute to "alter the conditions of . . . [Roller's] preexisting parole eligibility." Indeed, it has effectively "revoked" eligibility for an extra year following a denial.

The judgment is reversed, and the case is remanded with instructions to grant declaratory, and, if necessary, injunctive, relief in favor of Roller. [5]

[5] See Steffel v. Thompson, 415 U.S. 452, 468-471 (1974) (district court may anticipate that state authorities will comply with a declaratory judgment and thereby forego issuing an injunction).

Our decision does not, of course, require or even suggest that Roller be paroled. South Carolina need never parole him, so long as it considers the question every year.

REVERSED AND REMANDED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 91-6688
(CA-90-3054-3-20-J)

FILED: February 5, 1993

GARY LEE ROLLER,

Plaintiff-Appellant,

versus

MICHAEL J. CAVANAUGH, Executive Director of the South Carolina Department of Probation, Parole, and Pardon Services; SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES,

Defendants-Appellees.

ORDER

Appellees have filed a motion to stay mandate pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The Court grants the motion to stay

mandate until March 8, 1993 pursuant to the provisions of Rule 41(b) of the Federal Rules of Appellate Procedure.

Entered at the direction of Judge Hall with the concurrence of Judge Russell and Judge Morgan, United States District Judge sitting by designation.

For the Court

/s/ Bert M. Montague

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CA No. 3:90-3054-20J

Gary Lee Roller,116220)
Plaintiff,)
)
vs.)
)
Michael J. Cavanaugh,)
Executive Director of)
the South Carolina)
Department of Pro-)
bation, Parole, and)
Pardon Services,)
et al.)
Defendants.)

ORDER

This matter is before the court with the Report and Recommendation of the United States Magistrate Judge, made in accordance with 28 U.S.C. §636(b) and Local Rule 19.02 (D.S.C.). The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the United

States District Court. Matthews v. Weber, 423 U.S. 261 (1976). The court is charged with making a de novo determination of those portions of the Report and Recommendation to which specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the magistrate judge or recommit the matter to him with instructions. 28 U.S.C. §636(b)(1).

The plaintiff, Gary Lee Roller ("Roller"), is presently incarcerated by the South Carolina Department of Corrections on convictions of voluntary manslaughter and grand larceny. Roller was sentenced on March 25, 1983, to serve consecutive terms of thirty (30) and five (5) years. Roller initially became eligible for parole on October 27, 1990.

Roller received a parole hearing on

October 31, 1990, at which he was rejected for parole and notified his next hearing would be October 31, 1992.

S.C. Code Ann. §24-21-645 (Law. Co-Op. 1976) at the time of Roller's sentencing provided that all inmates would be reviewed for parole annually following an initial rejection for parole. That section was amended, effective June 3, 1986, to provide that a violent offender would not be rescheduled for another parole hearing for a period of two (2) years from the date of his rejection.

Roller brought this action under 42 U.S.C. §1983 to challenge the application of the two year waiting period for review of parole from the 1986 law. Roller contends that the application of the 1986 law to him violates the ex post facto clauses of the United States and South Carolina Constitutions and the due

process clauses of the South Carolina Constitution and the fourteenth amendment of the United States Constitution.

Both parties filed objections to the Report and Recommendation of Magistrate Judge Carr.

Roller states three objections. First, Roller contends that the magistrate judge misunderstood his claims which had the effect of amending his complaint. The court finds that Magistrate Judge Carr properly understood and fairly addressed Roller's claims. This objection is without merit.

Second, Roller asserts that he should be allowed to recover monetary damages from the defendants in their individual capacities and prospective relief from the defendants in the official capacity. The magistrate judge properly addressed each of these claims. The defendants in

their individual capacities are protected by a qualified immunity. Harlow v. Fitzgerald, 457 U.S. 800 (1982). Roller has made no showing of a lack of good faith to defeat this immunity. Therefore, the defendants are not subject to monetary damages.

Roller contends that he should be entitled to injunctive relief under Ex Parte Young, 209 U.S. 123 (1908). The magistrate judge properly stated that injunctive relief was the only relief that Roller could seek. However, the fact that Roller could seek injunctive relief against the defendant's in their official capacities does not mean that he was entitled to such relief. Therefore, the second objection is without merit.

Third, Roller states that he "realleges each and every pleading, affidavit, motion, and attachment put forth in this

action heretofore, as if repeated in full verbatim herein." A restatement of the allegations of the complaint is not a meritorious objection.

The defendants also objected to the Report and Recommendation of Magistrate Judge Carr. The defendants object to the conclusion that "§1983 can be used to challenge parole procedures", which is based on an interpretation of Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978). This court finds that the magistrate judge's interpretation of Strader is correct and that Strader is the valid law of this circuit. Therefore, this objection is without merit.

Further, the defendants cite Will v. Mich. Dept. of State Police, 491 U.S. 58 (1989) to assert that "Section 1983 ... does not provide a federal forum for litigants who seek a remedy against a

State for alleged deprivations of civil liberty." Id. at 66. However, the Supreme Court in Will went on to say that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" Id. at 71 n. 10 (citing Kentucky v. Graham, 473 U.S. 159 (1985); EX Parte Young, 209 U.S. 123 (1908). The claims against the defendants in their official capacities in so far as they sought injunctive relief were properly brought under 1983.[6] Therefore, this objection by the defendant is without merit.

Based on the foregoing, this court

[6] This is true even though this court find that the plaintiff is not entitled to relief on the merits of the claims.

finds that the objections are without merit. Magistrate Judge Carr's Report and Recommendation is adopted and incorporated herein by reference. Therefore, **IT IS ORDERED** that the defendants' motion for summary judgment is hereby granted.

IT IS SO ORDERED.

S/Henry M. Herlong, Jr.

Henry M. Herlong, Jr.

United States District

Judge

Greenville, South Carolina

November 1, 1991

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CA No. 3:90-3054-20J

Gary Lee Roller
Plaintiff

v.

Michael J. Cavanaugh, Executive Director of the South Carolina Department of Probation, Parole and Pardon Services, et al.

Judgment in a Civil Case

Decision by Court. This action came to hearing before the Court. The Court having adopted the recommendation of the U.S. Magistrate Judge, and having duly heard and granted the defendants' motion for summary judgment IT IS ORDERED AND ADJUDGED

That summary judgment is hereby entered for defendants Michael J. Cavanaugh, Executive Director of the South Carolina Department of Probation, Parole, and

Pardon Service and the South Carolina Department of Probation, Parole, and Pardon Service.

November 12, 1991 Ann A. Birch
Clerk

S/ Carol E. Moment
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

CA No. 3:90-3054-15J

Gary Lee Roller,116220)
Plaintiff,)
)
-versus-)
)
Michael J. Cavanaugh,)
Executive Director of)
the South Carolina De-)
partment of Probation,)
Parole, and Pardon)
Services, et al,)
Defendants.)

REPORT AND RECOMMENDATION

This civil rights complaint brought by a state prisoner proceeding pro se is before the undersigned United States Magistrate Judge for a report and recommendation on the defendants' summary judgment motion under Rule 56 of the Federal Rules of Civil Procedure. 28 U.S.C. §636(b).

The Plaintiff, Gary Lee Roller

(Roller), is presently incarcerated at a facility of the South Carolina Department of Corrections. Roller was convicted in the Chester County Court of General Sessions of voluntary manslaughter and grand larceny committed on December 13, 1982. He was sentenced on March 25, 1983, to serve thirty (30) years for voluntary manslaughter and five (5) years consecutive for grand larceny. He initially became eligible for parole on October 27, 1990, pursuant to the parole eligibility statute in force on the date of his offense.

Roller received a parole hearing on October 31, 1990, at which time he was rejected for parole, notified of the reasons for the rejection, and informed that his next hearing should be October 31, 1992.

Roller brings this civil rights action

pursuant to 42 U.S.C. §1983 against Michael J. Cavanaugh, Executive Director of the South Carolina Department of Probation, Parole, and Pardon Services, as well as all present members of the Pardon and Parole Board. The defendants are being sued in their official and individual capacities for compensatory and punitive damages, declaratory relief, and a court order enjoining the defendants from applying the South Carolina Omnibus Criminal Justice Improvement Act (Act) of 1986 related to the manner and timing of parole reviews to Roller.

Roller asserts that the defendants' application of the Act to him increasing the time between parole reconsideration hearings from one (1) to two (2) years is violative of the prohibition against ex post facto laws and denies him due

process under the Constitution of the United States.

Section 24-21-645 of the South Carolina Code of Laws (Law. Co-op. 1976) made effective June 15, 1981, provided that all inmates would be reviewed for parole annually following an initial rejection for parole. That section was amended effective June 3, 1986, to provide that a violent offender would not be rescheduled for another parole hearing for a period of two (2) years from the date of his rejection.

Roller contends:

1. The defendants application of the 1986 laws to Roller increases the punishment he must suffer for his crimes and is thus a impermissible retroactive application in violation of the ex post facto

clause.

2. Application of the 1986 laws to the plaintiff denies him a substantial protected liberty interest in violation of the due process clause of the fourteenth amendment of the United States Constitution.

3. The application of 1986 laws to the plaintiff violates due process and ex post facto clauses of the South Carolina Constitution.

On June 4, 1991, the defendants filed a motion to dismiss or for summary judgment. They argue that they are immune from liability under the eleventh amendment and not amenable to suit under §1983. Further, they assert they are

entitled to defense of qualified immunity. In addition, they argue that the plaintiff has not exhausted any state remedies as required and that the changes in parole procedures do not violate the ex post facto or due process clauses of the Constitution.

A copy of the defendants' motion and supporting memorandum was provided Roller on June 13, 1991, along with an explanation of dismissal and summary judgment procedures with pertinent extracts from Rules 12 and 56 of the Federal rules of Civil Procedure similar to that required by Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975).

In response, Roller filed his opposition to the defendants' motion, memorandum in support of the opposition, his own affidavit, a motion for appointment of counsel, and an affidavit

in support of motion for appointment of counsel. Roller's motion for appointment counsel was denied on July 15, 1991. Hence, it appears that the defendants' motion is ready for consideration.

A review of the record and relevant case law indicates that the defendants' summary judgment motion should be granted.

Roller's claim for damages against the South Carolina parole officials in their official capacity is barred by the eleventh amendment. See, Edelman v. Jordan, 415 U.S. 651, 662-63 (1974). Further, the parole officials sued in their individual capacities are entitled to absolute immunity under Pope v. Chew, 521 F.2d 400 (4th Cir. 1975). In Pope, the Fourth Circuit held that parole officials involved in the quasi-judicial function of considering parole

applications are entitled absolute personal immunity. 521 F.2d at 405-06. The defendants in their individual capacities acting as parole officials are protected by the qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 (1982). Further since the constitutional question raised by Roller is unsettled, qualified immunity is an acceptable alternate ground for dismissal. See, Anderson v. Creighton, 107 S.Ct. 3034 (1987). Nonetheless, a defendant sued in his or her capacity as a Parole Board member could be subject to an injunction under the Ex Parte Young, 209 U.S. 123 (1908) (exception to eleventh amendment immunity). Roller has alleged an ongoing violation bringing his claim within the purview of the Young exception. Papasan v. Allain, 478 U.S. 265 (1986), McConnell v. Adams, 829 F.2d 1319 (4th Cir. 1987),

cert. denied, ____ U.S. ____, 108 S.Ct. 1731 (1988). Therefore, only to the extent that Roller seeks injunctive relief preventing these officials future conduct, may this action proceed.

The defendants' argument that Roller's action is designed ultimately to shorten the period of his incarceration and thus is subject to the exhaustion requirement of 28 U.S.C. §2254(b) is unfounded. While a §1983 suit is not a substitute for a writ of habeas corpus, here Roller seeks only consideration for parole, not release or shortening of the period of incarceration. Prieser v. Rodriguez, 411 U.S. 475 (1973). Under these circumstances, the Fourth Circuit has held that §1983 may be used to challenge parole procedures. Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978).

Initially, there is no constitutional

right to parole unless the state creates a protectable liberty interest in the establishment of a parole system. See, Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 99 S.Ct. 2010 (1979). Such an interest arises only when a parole statute provides that specific conditions mandate release. Damiano v. Florida Parole & Probation Commission, 785 F.2d 929 (11th Cir. 1986).

The plaintiff has no right to parole in South Carolina. S.C. Const. Art. IV, §14. Parole is a matter of grace bestowed by the government. Bearden v. State, 443 F.2d 1090 (1971). State law does not mandate parole even if certain conditions are met by an inmate. That is, the conditions listed in §24-21-640 must all be satisfied before the Board will consider exercising their discretion to release an inmate on parole. In the

event the Board denies parole to an inmate, it is required to give the inmate written notice of the reasons that the parole was rejected. It is uncontroverted that Roller was provided with the reasons for the denial of parole. His due process claims are without merit.

Next, Roller alleges that the application of the 1986 Act to him by the defendants violates the ex post facto clause of the United States Constitution. In 1982, when he committed his crimes, §24-21-645 provided that the frequency of parole reconsideration hearings would be every twelve (12) months following an initial rejection for parole. In 1986, §24-21-645 was amended to provide that parole reconsideration hearings for persons convicted of violent crimes as defined in §16-1-60 also effective June 3, 1986, would be held every two (2) years following an initial rejection. It is uncontested that the defendants have

applied these code sections retroactively to Roller.[7]

The United States Constitution, Art. I, §10 states in pertinent fact: "No state . . . shall pass any bill of attainer or ex post facto law . . ." In Fender v. Thompson, et al, 883 F.2d 303 (4th Cir. 1989), the Fourth Circuit held that the ex post facto clause "forbids . . . the state to enact any law which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment than that then prescribed." Weaver v. Graham, 450 U.S. 24 (1981). Two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is it must apply to events occurring before its enactment, and it must disadvantage the

[7] Roller's conviction for the crime of voluntary manslaughter is considered a violent crime subject to this section.

offender effected by it. Id. at 29.

Further, the Supreme Court has held:

> "[T]he prohibition of ex post facto laws does not extend to every change of the law that 'may work to the disadvantage of a defendant.' It is intended to secure 'substantial personal rights' from retroactive deprivation and does not 'limit the legislative control of remedies and modes of procedure which do not effect matters of substance.' (quoting Dolbert v. Florida, 432 U.S. 282, 293 (1977).

Portley v. Grossman, 444 U.S. 1311, 1312 (1980).

In Gunter v. State, the South Carolina Supreme Court in addressing this issue held:

> On this issue, we find persuasive the holding of the California Supreme Court In Re: Jackson, 39 Cal.3rd 464, 703 Pac.2d 100 (1985). There the court held that a statutory amendment prolonging the time before reconsideration for parole was a procedural change outside the purview of the ex post facto clause. The court reasoned that the amendment did not alter the criteria by which parole suitable is determined, but rather only changed the frequency with which an inmate was given to demonstrate parole suitability. By the same token, the standards governing the petitioner's parole eligibility have not been changed. Instead, only the frequency with which petitioner can be reconsidered for parole has been altered. We find no ex post facto violation in the application of the questioned statute to petitioner.

378 S.E.2d 443 (S.C. 1989).

No additional post-conviction punishment has been imposed because Roller's sentence has not been lengthened, his possibility of parole has not been revoked, and the conditions he must meet to be considered for parole eligibility

remain the same. The only change is a procedural one controlling how often Roller's case is reviewed for parole.

Lastly, Roller's allegation that application of the Act to him is violative of the South Carolina Constitution does not provide a basis for a §1983 suit. Section 1983 was intended to vindicate only federal rights determined under federal substantive law, not claims arising under state law. Weller v. Department of Social Services, 901 F.2d 387 (4th Cir. 1990); Clark v. Link, 855 F.2d 156 (4th Cir. 1988); See, Paul v. Davis, 424 U.S. 693 (1976); Riccio v. County of Fairfax, 907 F.2d 1459 (4th Cir. 1990).

In summary, inmates in South Carolina have no protected liberty interest in parole; lengthening of the time between parole reconsideration from one (1) to two (2) years does not offend the due process or ex post facto protections of

the United States Constitution, and §1983 is not available to test application of the Act to Roller under the South Carolina Constitution.

Accordingly, for the above stated reasons, it is recommended that the defendants' motion for summary judgment be granted.

Respectfully submitted,

Robert S. Carr

United States Magistrate Judge

Charleston, South Carolina

September 10, 1991

THE STATE OF SOUTH CAROLINA

In the Supreme Court

Jimmy Lee Gunter, Petitioner,

v.

State of South Carolina, Respondent.

ON WRIT OF CERTIORARI

Appeal from Richland County

George B. Timmerman, Jr.,

Special Circuit Judge

Opinion No. 22981

Submitted January 31, 1989 -

Filed March 6, 1989

AFFIRMED

Assistant Appellate Defender Joseph L. Savitz, III, of S.C. Office of Appellate Defense, of Columbia, for petitioner.

Attorney General T. Travis Medlock, Chief Deputy Attorney General Donald J. Zelenka, Assistant Attorney General Frank L. Valenta, Jr., all of Columbia, for respondent.

PER CURIAM: Petitioner was convicted of voluntary manslaughter and was sentenced to imprisonment for thirteen (13) years. He now seeks a writ of certiorari to review the denial of his application for post-conviction relief

(PCR). We grant certiorari, dispense with further briefing, and affirm.

Petitioner alleges that the application of three statutes to him violates the ex post facto clauses of the United States and South Carolina Constitutions.[8] First, petitioner challenges S.C. Code Ann. §24-21-645 (Supp. 1987), which permits him to be reconsidered for parole only on a biannual basis. Under the statutory scheme in effect when petitioner committed the crime, he was eligible for reconsideration for parole every twelve (12) months. See S.C. Code Ann. §24-21-620 (Supp. 1987). In 1986, §24-21-645 was amended to provide that persons convicted of violent crimes, defined in §16-1-60 to include voluntary manslaughter,

[8]See U.S. Const. art. I, §10; S.C. Const. art. I, §4.

will be reconsidered for parole every two years.

On this issue we find persuasive the holding of the California Supreme Court in In re Jackson, 39 Cal.3d 464, 703 P.2d 100, 216 Cal. Rptr. 760 (1985). There the Court held that a statutory amendment prolonging the time before reconsideration for parole was a procedural change outside the purview of the ex post facto clause. Cf. Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981) (generally ex post facto clause does not apply to procedural changes). The Court reasoned that the amendment did not alter the criteria by which parole suitability is determined, but rather changed only the frequency with which an inmate was given to demonstrate parole suitability.

By the same token, the standards governing petitioner's parole eligibility

have not been changed. Instead, only the frequency with which petitioner can be reconsidered for parole has been altered. We find no ex post facto violation in the application of the questioned statute to petitioner.

Second, petitioner challenges S.C. Code Ann. §24-13-650 (Supp. 1987), which prohibits any person convicted of a violent offense from being released under the work release program in the community where the crime was committed. It must be noted initially that we have found nothing in the statutes indicating that petitioner had a pre-existing right to be considered for work release in the community where the offense was committed. Therefore, it seems doubtful whether petitioner has made out a legitimate ex post facto claim.

Even assuming petitioner had

previously been eligible for work release in the community where the offense was committed, we find no ex post facto violation in petitioner being denied this possibility under §24-13-650. The Board of Corrections has discretion whether to allow an inmate even to participate in a work release program. See S.C. Code Ann. §24-3-20 (1976). Therefore, participation in a work release program is a privilege, giving rise to no vested rights cognizable under the ex post facto doctrine. People v. Miller, 79 A.D.2d 687, 434 N.Y.S.2d 37 (1980).

Further, in Morris v. Meacham, 718 P.2d 1354 (Okla. 1986), the Oklahoma Supreme Court upheld the retroactive application of a statutory amendment rendering the inmate ineligible for assignment to a work release program. The Court said that modes of procedure,

such as a security classification, do not affect matters of sufficient substance to invoke the prohibition against ex post facto laws. Cf. Mellinger v. Idaho Dep't of Corrections, 114 Idaho 494, 757 P.2d 1213 (Ct. App. 1988) (upholding implementation of stricter conditions of release).

In the present case, §24-13-650 does not deny petitioner consideration or even require him to face tougher criteria for the work release program. Rather, he is merely foreclosed from being released into the community in which he committed the crime. We find no ex post facto violation in applying this statute to petitioner.

Petitioner's remaining argument concerns supervised furloughs. As S.C. Code Ann. §24-13-710 (Supp. 1987) read at the time the offense was committed,

petitioner was at least theoretically capable of satisfying the criteria for obtaining a furlough. However, since that time the statute has been amended to include, among other things, requirements that the inmate be neither sentenced to more than five years nor convicted of a violent offense. Because petitioner received a sentence of thirteen (13) years for a violent offense, he is now foreclosed from being considered for a furlough.

In Milhouse v. Levi, 548 F.2d 357 (D.C. Cir. 1976), the court held that regulations adversely affecting an inmate's eligibility for furloughs are not subject to the constitutional prohibition against ext post facto laws. The Court distinguished furlough programs from parole, describing furlough programs

as internal rehabilitation procedures that are not an integral part of the sentencing process.

We agree that the furlough program is not a part of the sentencing process. As stated in Anders v. South Carolina Parole & Community Corrections Bd., 279 S.C. 206, 305 S.E.2d 229 (1983), the purpose behind the enactment of §24-13-710 was to help alleviate prison overcrowding. The purpose was not to confer substantial rights upon certain members of the prison population. We therefore hold that the application of §24-13-710, as amended, to petitioner does not amount to an ex post facto violation.

For the foregoing reasons, the denial of post-conviction relief is AFFIRMED.

S/George T. Gregory, Jr.

S/David W. Harwell

S/A. Lee Chandler

S/Ernest A. Finney, Jr.

S/Jean Hoefer Toal

S.C. Code Ann. §24-21-610 (1976) enacted June 15, 1981 (Parole Eligibility)

"Section 24-21-610. In all cases cognizable under this chapter the Board may, upon ten days' written notice to the solicitor and judge who participated in the trial of any prisoner, parole such prisoner convicted of a felony and imprisoned in the state penitentiary, in any jail or upon the public works of any county:

(1) Who, if sentenced for not more than thirty years, shall have at least one third of the term;

(2) Who, if sentenced to life imprisonment or imprisonment for any period in excess of thirty years, shall have served at least ten years;

(3) Who, if he is a first offender and is sentenced for an indeterminate term

shall have served the minimum for which he was sentenced.

Provided, if after January 1, 1984, the Board shall find that the statewide case classification system provided for in Chapter 23 of this title has been implemented, that an intensive supervision program for parolees who require more than average supervision has been implemented, that a system for the periodic review of all parole cases in order to assess the adequacy of supervisory controls and of parolee participation in rehabilitative programs has been implemented, and that a system of contracted rehabilitative services for parolees is being furnished by public and private agencies, then in all cases cognizable under this chapter the Board may, upon ten days' written notice to the solicitor and judge who participated in

the trial of any prisoner, to the victim or victims, if any, of such felony, and to the sheriff of the county where the prisoner resides or will reside, parole such prisoner convicted of a felony and imprisoned in the state penitentiary, in any jail or upon the public works of any county:

(1) Who, if sentenced for the crime of murder, armed robbery, criminal sexual assault, assault and battery with intent to kill or kidnapping, shall have served at least one third of the term; provided, that for any other crime the prisoner shall have served at least one fourth of the term;

(2) Who, if sentenced to life imprisonment or imprisonment for any period in excess of forty years, shall have served at least ten years;

(3) Who, if he is a first offender and

is sentenced for an indeterminate term shall have served the minimum for which he was sentenced.

Provided, further, that the provisions of this section shall not affect the parole ineligibility provisions for murder and armed robbery as set forth respectively in Section 16-3-20 and Section 16-11-330.

Provided, further, that in computing parole eligibility, no deduction of time shall be allowed in any case for good behavior, but that after June 30, 1981, there shall be deductions of time in all cases for earned work credits, notwithstanding the provisions of Section 16-3-20, Section 16-11-330 and Section 24-13-230.

Notwithstanding the provisions of this section, the Board may parole any prisoner not sooner than one year prior

to the prescribed date of parole eligibility when, based on medical information furnished to it, the Board determines that the physical condition of the prisoner concerned is so serious that he would not be reasonably expected to live for more than one year. Notwithstanding any other provision of this section or of law, no prisoner who has served a total of ten consecutive years or more in prison shall be paroled until the Board has first received a report as to his mental condition and his ability to adjust to life outside the prison from a duly qualified psychiatrist or psychologist."

S.C. Code Ann. §24-21-620 (1976) enacted June 15, 1981 (parole hearing rescheduling)

"Section 24-21-620. Within the ninety-day period preceding a prisoner having served one-fourth of sentence, the Board, either acting in a three-member panel or meeting as a full Board, shall review the case, regardless of whether or not any application has been made therefor, for the purpose of determining whether or not such prisoner is entitled to any of the benefits provided for in this chapter; provided, that in cases of prisoners in confinement due to convictions for nonviolent crimes, an administrative hearing officer may be appointed by the Commissioner of Paroles and Pardons to review the case who shall submit to the full Board written findings of fact and

recommendations, which shall be the basis for a determination by the Board. Upon an affirmative determination, the prisoner shall be granted a provisional parole. Upon a negative determination, the prisoner's case shall be reviewed every twelve months thereafter for the purpose of such determination.

S.C. Code Ann. §24-21-645 (1976) enacted June 3, 1986 (parole hearing re-scheduling)

"Section 24-21-645. The Board may issue an order authorizing the parole which must be signed either by a majority of its members or by all three members meeting as a parole panel on the case, ninety days prior to the effective date of the parole; provided that at least two-thirds of the members of the Board must authorize and sign orders

authorizing parole for persons convicted of a violent crime as defined in Section 16-1-60. A provisional parole order shall include the terms and conditions, if any, to be met by the prisoner during the provisional period and terms and conditions, if any, to be met upon parole. Upon satisfactory completion of the provisional period, the Executive Director or one lawfully acting for him, shall issue an order, which, if accepted by the prisoner, shall provide for his release from custody.

Provided, that upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole."

S.C. Code Ann. §24-21-650 (1976) enacted June 3, 1986 (parole hearing re-scheduling)

"Section 24-21-650. The Board shall issue an order authorizing the parole which must be signed by at least a majority of its members, with terms and conditions, if any; provided, that at least two-thirds of the members of the Board must sign orders authorizing parole for persons convicted of a violent crime as defined in Section 16-1-60. Thereupon the supervisor of parole, or one lawfully acting for him, shall issue a parole order, which, if accepted by the prisoner, shall provide for his release from custody.

Provided, that upon a negative determination of parole, prisoners in confinement for a violent crime as

defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole."

S.C. Code Ann. §16-1-60 (1976) enacted June 3, 1986
(Definition of violent crime)

"Section 16-1-60. For purposes of definition under South Carolina law a violent crime includes the offenses of murder, criminal sexual conduct in the first and second degree, assault and battery with intent to kill, kidnapping, voluntary manslaughter, armed robbery, drug trafficking as defined in Section 44-53-370(e), arson in the first degree, burglary in the first degree, and burglary in the second degree under Section 16-11-312(B)."

ORIGINAL

Supreme Court, U.S.
FILED
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No. 92-1510

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

MICHAEL J. CAVANAUGH, EXECUTIVE DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES; AND **SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES,**

PETITIONERS,

versus

GARY LEE ROLLER,

RESPONDENT.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Respondent, Gary Lee Roller, prays that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit be denied.

SUMMARY OF THE ARGUMENTS

I. The Circuit Court correctly determined that as the Respondent, Roller, was challenging the denial of a pre-existing statutory right to parole reconsideration rather than the "fact or duration" of his sentence, 42 U.S.C. §1983 was an appropriate avenue for declaratory and injunctive relief. Under the principles of Preiser v. Rodriguez, 411 U.S. 475 (1973), and the prior Circuit Court decision in Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978), as the Respondent was not seeking release from prison "now or ever" but simply the right to a timely hearing, there is no requirement that the action be brought under a writ of habeas corpus.

II. A statutory change in the time period between parole reconsideration hearings is legally indistinguishable from an increase in time for initial consideration of parole and is subject to ex post facto protection. As the Respondent was statutorily entitled to reconsideration for parole on a yearly basis at the time of his crime and at the time of his sentencing, a subsequent statutory change to provide for a reconsideration hearing every two (2) years should not be applied to the Respondent. The Respondent had a legitimate expectation at the time of his sentencing that if denied parole at his initial hearing he would be entitled thereafter to review for parole on a yearly basis.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY DETERMINED THAT A CHALLENGE TO DENIAL OF PAROLE CONSIDERATION MAY BE PROPERLY BROUGHT UNDER 42 U.S.C. §1983.

The Petitioner, State, seeks review of a long standing rule of law in the Fourth Circuit that changes in parole eligibility may be challenged under 42 U.S.C. §1983. In essence the State bases its jurisdictional challenge upon the premise that the Circuit Court erred in deciding Strader v. Troy, 571 F.2d 1263 (4th Cir. 1978). It is argued that Strader and this case violate this Court's decision in Preiser v. Rodriguez. 411 U.S. 475 (1973). The State advances no other basis for this Court to grant certiorari under Rule 10.

Preiser v. Rodriguez, 411 U.S. at 509, held "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." If Respondent were asking for either an immediate or speedy release from prison, then clearly Preiser would mandate that such action be brought pursuant to habeas corpus. Release was not the relief sought by Roller; only the opportunity for a timely parole hearing. Roller's lawsuit challenged the State's action in retrospectively cutting in half his opportunities to seek parole in violation of the Constitution's protection against ex post facto laws. It was never alleged that Respondent was unlawfully detained nor that he was entitled to be released on parole, now or in the future. "Like the inmate in Strader, Roller does not argue that he is entitled

to parole." (Opinion, Fourth Circuit Court of Appeals, Roller v. Cavanaugh, Petitioner's Appendix at p. 9).

Where the prisoner's challenge is not to the fact of imprisonment or its duration, it is inappropriate to bring a habeas corpus action. The appropriate and only federal remedy available to a prisoner for declaratory or injunctive relief to matters unrelated to the fact of confinement is §1983. The Respondent respectfully requests that the Petition for Writ of Certiorari be denied on this issue.

II. A STATUTORY RIGHT TO PAROLE ELIGIBILITY AND RECONSIDERATION HEARINGS IS PROTECTED FROM SUBSEQUENT LEGISLATIVE CHANGES BY THE PROHIBITION OF EX POST FACTO LAWS.

The State seeks certiorari review of this issue as an earlier decision of the South Carolina Supreme Court in Gunter v. State, 298 S.C. 113, 378 S.E.2d 443 (1989), conflicts with the Fourth Circuit's decision in this case. Gunter held that the increase in time for parole reconsideration hearings was not a violation of the ex post facto clause.

The State concedes that the change in time between reconsideration hearings works to Roller's disadvantage. The State argues, however, that the disadvantage is insubstantial and is somehow different in nature from a delay in initial consideration for parole. Conceding that delay in initial parole eligibility is violative of the ex post facto clauses of the Constitution, the State argues that once Roller reaches his initial parole eligibility date he is eligible for parole thereafter and the one year delay in reconsideration

is simply a procedural change "governing the interval between parole hearings after a rejection." (State's Petition for Certiorari, p. 37).

The State engages in a game of semantics when distinguishing between parole "eligibility" and "reconsideration". The reality of the State's present situation is that once parole has been denied, Roller is not again eligible for consideration of parole for two years rather than the one year review mandated by law at the time of his crime and sentencing. The State makes the somewhat circular argument that Roller is currently eligible for parole although he is prevented from engaging in the only procedure by which he may obtain parole. As pointed out by the Circuit Court, "[e]ligibility without consideration is cold comfort." (Appendix p. 17).

The State agrees that Georgia violated the ex post facto provision of the Constitution when it changed parole reconsideration hearings from every year to every 8 years. Akins v. Snow, 922 F.2d 1558 (11th Cir. 1991). The State is unable to find similar fault in its own actions. The only difference between Georgia's and South Carolina's actions is the amount of time involved. Certainly Petitioner would not take the position that changing the actual sentence for a crime would not violate the ex post facto provision of the Constitution if the sentence increased by only 1 year, as opposed to 8 years. The violation either occurs or not and the determination of what constitutes a violation cannot reasonably hinge on the magnitude of the violation. The State's argument that one year was not a matter of substance was not accepted by the Circuit Court. "We are not willing to disparage the 'substance' of a year, especially a year in prison." (Petitioner's Appendix, p. 16).

The Circuit Court correctly determined that the impact of the change in statutory law worked to the disadvantage of Roller and that the protections of the ex post facto clauses of the Constitution extend to statutory changes in time periods for parole reconsideration.

CONCLUSION

FOR THE FOREGOING REASONS, the Respondent requests that the Petition for Writ of Certiorari be denied.

RESPECTFULLY SUBMITTED, this the 14th day of April, 1993, in Columbia, South Carolina.

FAIREY, PARISE & MILLS, P. A.

W. GASTON FAIREY

Post Office Box 8443
Columbia, South Carolina 29202
(803) 252-7606

ATTORNEY FOR RESPONDENT.

FAIREY & PARISE, P. A.
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COLUMBIA, SOUTH CAROLINA 29202
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April 14, 1993

EXPRESS MAIL SERVICE

The Honorable William K. Suter
Clerk of Court
Supreme Court of the United States
1 First Street, N.E.
Washington, D. C. 20543

ATTENTION: RUTH B. JONES, Assistant Clerk

Re: Michael Cavanaugh, et al. v. Gary Lee Roller, No 92-1510

Dear Ms. Jones and Mr. Suter:

Enclosed please find the original and one (1) copy of each of the following, which we do hereby submit for filing in reference to the above-captioned action:

1. Respondent's Brief in Opposition to Petition for Writ of Certiorari;

2. Motion For Leave To Proceed In Forma Pauperis;

3. Affidavit of Timely Filing; and

4. Affidavit of Service By Mail.

If you require anything further from us or have any questions, please do not hesitate to contact our office and thank you for your time and assistance herein.

Sincerely,

FAIREY, PARISE & MILLS, P. A.

W. Gaston Fairey

WGF/cje
Enclosures
cc & enc.: Carl N. Lundberg
Gary Lee Roller

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SUPREME COURT, U.S.

No. 92-1510

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

MICHAEL J. CAVANAUGH, EXECUTIVE DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES; AND **SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES,**

PETITIONERS,

versus

GARY LEE ROLLER,

RESPONDENT.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

AFFIDAVIT OF SERVICE BY MAIL

NOW COMES the undersigned who swears and affirms the following upon his oath:

THAT he is a member of the United States Supreme Court Bar having been admitted on November 26, 1984.

THAT timely service of the Respondent's Brief in Opposition to the Petition for Writ of Certiorari and Motion to Proceed In Forma Pauperis was completed on the 14th

day of April, 1993, by mailing one (1) copy of said Brief in Opposition and one (1) copy of the Motion from the Main Post Office, Assembly Street, Columbia, South Carolina, first class, postage prepaid, addressed to Carl N. Lundberg, Esquire, Chief Legal Counsel, South Carolina Department of Probation, Parole, and Pardon Services, Post Office Box 50666, Columbia, South Carolina 29250.

AND THAT all parties required to be served in this matter have been so served.

SIGNED this the 14th day of April, 1993, in Columbia, South Carolina.

FAIREY, PARISE & MILLS, P. A.

W. GASTON FAIREY

Post Office Box 8443
Columbia, South Carolina 29202
(803) 252-7606

ATTORNEY FOR RESPONDENT.

SWORN TO AND SUBSCRIBED BEFORE ME
on this the 14th day of April, 1993.

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 7-25-2002

No. 92-1510

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

MICHAEL J. CAVANAUGH, EXECUTIVE DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES; AND **SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES,**

PETITIONERS,

versus

GARY LEE ROLLER,

RESPONDENT.

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fourth Circuit

AFFIDAVIT OF TIMELY FILING

NOW COMES the undersigned who swears and affirms the following upon his oath:

THAT he is a member of the United States Supreme Court Bar having been admitted on November 26, 1984.

THAT timely mailing of the Respondent's Brief in Opposition to Petition for Writ of Certiorari and Motion to Proceed In Forma Pauperis was completed on the 14th day

of April, 1993, said Brief and Motion being mailed to the Office of the Clerk of Court of the Supreme Court of the United States by Express Mail, One-Day Service through the United States Mail, postage prepaid.

AND THAT service was had upon Carl N. Lundberg, Esquire, Chief Legal Counsel, South Carolina Department of Probation, Parole, and Pardon Services, Post Office Box 50666, Columbia, South Carolina 29250, on the 14th day of April, 1993, by mail.

SIGNED this the 14th day of April, 1993, in Columbia, South Carolina.

FAIREY, PARISE & MILLS, P. A.

W. GASTON FAIREY

Post Office Box 8443
Columbia, South Carolina 29202
(803) 252-7606

ATTORNEY FOR RESPONDENT.

SWORN TO AND SUBSCRIBED BEFORE ME
on this the 14th day of April, 1993.

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 7-28-2002

FILED
JUL 6 1993
OFFICE OF THE CLERK

No. 92-1510

In The

Supreme Court of the United States

October Term, 1992

MICHAEL J. CAVANAUGH, EXECUTIVE DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES; SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES,

Petitioners,

vs.

GARY LEE ROLLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

JOINT APPENDIX

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Attorney General

Edwin W. Evans, Chief
Deputy Attorney General

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*Counsel of Record

Petition For Certiorari Filed March 8, 1993
Certiorari Granted May 24, 1993

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12/10/91	Prisoner (cvrgt) case docketed. (yj)
1/15/93	Published, authored opinion filed. ([91-6688] (jc)
1/15/93	Judgment order filed. Decision: Reversed and Remanded. [91-6688] (yj)
2/5/93	COURT ORDER filed granting motion to stay mandate [1763214-1] until 3/8/92 Copies to all counsel. [91-6688] (yj)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

GARY LEE ROLLER #116220
(Enter above the full name of the plaintiff in this action.)

Vs.

MICHAEL J. CAVANAUGH, EXECUTIVE DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES, ET AL.

(Enter above the full name(s) of defendant or defendants in this action.)

COMPLAINT

Civil Action No. 3:90-3054-15J
(To be assigned by Clerk)

(Filed Dec. 28, 1990)

I. Previous Lawsuits

A. Have you begun other lawsuits in state or federal court dealing with the same facts involved in this action or otherwise relating to your imprisonment? Yes ( ) No (XX)

B. If your answer to A is yes, describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on another piece of paper, using the same outline.)

1. Parties to this previous lawsuit

Plaintiffs N/A

Defendants N/A

2. Court (if federal court, name the district; if state court, name the county)

N/A

3. Docket number N/A

4. Name of judge to whom case was assigned N/A

5. Disposition (for example: Was the case dismissed? Was it appealed? Is it still pending?)

N/A

6. Approximate date of filing lawsuit N/A

7. Approximate date of disposition N/A

II. Place of Present Confinement Central Correctional Institution, 1515 Gist Street, Columbia, S.C. 29202

A. Is there a prisoner grievance procedure in this institution? Yes (XX) No ( )

B. Did you present the facts relating to your complaint in the state prisoner grievance procedure? Yes ( ) No (X)

C. If your Answer is YES,

1. What steps did you take? N/A

2. What was the result? N/A

D. If your answer is No, explain why not. The grievance procedure here at this prison does not deal with constitutional violations.

E. If there is no prison grievance procedure in the institution, did you complain to prison authorities? Yes (XX) No ( )

F. If your answer is YES,

1. What steps did you take? I asked my classification case worker about why the parole board was misapplying new law to me.

2. What was the result? I was told that what they were doing was right and that they could do it.

III. (In Item A below, place your name and inmate number in the first blank and place your present address in the second blank. Do the same for additional plaintiffs, if any.)

A. Name of plaintiff Gary Lee Roller #116220

Address 1515 Gist Street, Bldg. #1

Columbia, S.C. 29202

(In Item B below, place the full name of the defendant in the first blank, his official position in the second blank, and his place of employment in the third blank. Use Item C for the names, positions, and places of employment of any additional defendants)

B. Defendant Michael J. Cavanaugh is employed as Executive Director of the S.C.D.P.P.P.S. at 2221 Devine Street, Columbia, S.C.

C. Additional Defendants All present members of the South Carolina Department of Probation, Parole, and Pardon Services Board, et al.

Statement of Claim

(State here as briefly as possible the *facts* of your case. Describe how each defendant is involved. Include also the names of other persons involved, dates, and places. Do not give any legal arguments or cite any cases or

statutes. If you intend to allege a number of related claims, number and set forth each claim as a separate paragraph. Use as much space as you need. Attach extra sheet if necessary.)

CIVIL RIGHTS COMPLAINT WITH TRIAL BY JURY DEMAND

This is a 1983 Action filed by Gary Lee Roller, a State prisoner, alleging violations of his Constitutional rights, and seeking money damages, declatory [sic] relief, and injunctive relief. Plaintiff further seeks a trial by JURY.

JURISDICTION

1 This action is brought pursuant to 42 U.S.C. 1983.

2. This Court has jurisdiction founded upon 28 U.S.C. 1314.

3. Plaintiff further invokes the pendent jurisdiction of this Court.

4. The amount in controversary exceeds Ten-Thousand and no 100 dollars.

PARTIES

5. The Plaintiff, Gary Lee Roller, is and was at all times relevant to this lawsuit, a citizen of the United States of America and of the State of South Carolina.

6. Defendant, Michael J. Cavanaugh, is and was at all times relevant to this lawsuit, a citizen of the United States of America and of the State of South Carolina.

Michael J. Cavanaugh is the executive director of the parole board of South Carolina. It is his responsibility's [sic], along with all other members of the parole board, to provide for the proper care, treatment, supervision, and management of the offenders under the control of the parole board. Michael J. Cavanaugh is sued in his official and individual capacities. All other members of the South Carolina Board of Probation, Parole, and Pardon Services are sued in their official and individual capacities.

FACTS

7. Plaintiff, Gary Lee Roller, was arrested in December of 1982 and was sentenced in March of 1983 to a term of thirty (30) years for the crime of voluntary manslaughter, and five (5) years consecutive for grant larceny, by the Honorable Judge George Coleman, at the Chester County Courthouse.

8. The law concerning parole that was in effect at the time of Plaintiff's conviction in March of 1983, were Section 10 of Act 100, Section 24-21-620 of the South Carolina Code of Laws that was last amended in 1981 and specifically stated:

> . . . . upon a negative determination the prisoners case *SHALL* be reviewed every twelve (12) months thereafter for the purpose of such determination.

9. This was the applicable law in effect at the time of Plaintiff's conviction. This was the law that the Honorable Judge George Coleman took into consideration when he sentenced Plaintiff; this was the law that was and is part of Plaintiff's sentence.

10. In June of 1986, the laws concerning parole eligibility were changed by the State Legislature. This change became effective January of 1987; this new law *extended* the re..ew of prisoners convicted of a violent crime (*Plaintiff's crime is NOT classified a violent crime by S.C.D.C. and Plaintiff did go before the parole board in one-fourth of his time instead of one-third time as the violent offenders do*) to twenty-four (24) months after a negative determination of a prisoners initial parole review.

11. Plaintiff became eligible for parole after completing one-fourth of his original sentence, and was taken before the parole board in October of 1990 for his initial review.

12. At this time, October 1990, Plaintiff was denied parole by the members of the parole board, and Plaintiff received a notice of rejection that stated that Plaintiff will again be scheduled for a parole consideration hearing on or about October 31, 1992.

13. It is clear that the South Carolina Department of Probation, Parole, and Pardon Service are mis-applying the law of 1986 to Plaintiff with total disregard of the law that was in effect when Plaintiff was sentenced and is part of Plaintiff's sentence.

FIRST CAUSE OF ACTION

The Defendant(s) actions, as stated in paragraph 1 thru 13, have violated the Ex-Post Facto Clause of Article I, Section 10 of the United States Constitution by:

(a) The unconstitutional retroactive application of the more punitive in nature and design

laws of 1986 to Plaintiff whose sentencing took place in 1983;

(b) The unconstitutional application of the new 1986 law to Plaintiff was unforseeable by Plaintiff at the time of Plaintiff's sentencing, and is altering Plaintiff's situation to his disadvantage;

(c) Plaintiff was given *No Fair Warning* that the time between his parole reviews would increase an extra twelve (12) months, when he was sentenced for his crimes in 1983;

(d) This mis-interpretation of the 1986 laws is a mid-stream increase in punishment as applied to Plaintiff; an increase of Twelve (12) extra months imprisonment before Plaintiff's next opportunity to be considered for parole, is harsher and more burdensome punishment than the punishment in effect when Plaintiff was sentenced.

(e) Plaintiff is suffering increased punishment due to this unconstitutional application of the 1986 laws; punishment that is harsher than the punishment proscribed by State Statute during Plaintiff s sentencing;

(f) This impermissable retroactive application of the 1986 parole statutes by the parole board, is penalizing Plaintiff more severly [sic] than would have been possible at the time that Plaintiff last committed an act for which Plaintiff was sentenced to;

(g) This unconstitutional application of the 1986 parole statutes to Plaintiff, is being preformed [sic] by the Defendant(s) under the color of State law without the express authority to do so.

SECOND CAUSE OF ACTION

The Defendant(s) actions as stated in paragraphs 1 thru 13 and the First Cause of Action, violates Substantial Due Process of the Fourteenth Amendment of the Constitution of the United States of America, in that:

(a) The applicable parole statutes at the time of Plaintiff s crime afforded Plaintiff substantial protectable property and liberty rights, and the application of the 1986 laws to Plaintiff is depriving Plaintiff these guaranteed entitlements and substantial protections.

(b) The application of the 1986 laws to Plaintiff, whose conviction took place in 1983, have impermissably forced Plaintiff to suffer post-conviction, Legislative increased punishment without the protections of a judicial trial; punishment in addition to that prescribed by statute at the time of Plaintiff's conviction.

(c) The unconstitutional application of the 1986 laws to Plaintiff, who was sentenced in 1983, aggrevates and makes more greater Plaintiff s sentence than it was at the time of Plaintiff's sentencing.

(d) This unconstitutional retroactive application of the 1986 parole statutes to Plaintiff by the Defendant(s) is an on-going practice that Defendant(s) are preforming [sic] *Under The Color of State Law,* without the express authority to do so, and are being preformed [sic] in an arbitrary and vindictive manner toward Plaintiff.

THIRD CAUSE OF ACTION

As a direct result of Defendant(s) mis-interpertation and Mis-Application of the 1986 laws, as stated in paragraphs 1 thru 13, in Plaintiff's First Cause of Action, and

Plaintiff's Second Cause of Action, Defendant(s) are violating Article I Section 3 (Due Process), and Article I Section 4 (Ex-Post Facto) of the Constitution of the State of South Carolina, in that:

(a) Defendant(s) actions have caused Plaintiff to suffer severe emotional suffering, loss of potential family contact and support, and the denial of guaranteed constitutional rights.

(b) The unconstitutional [sic] of the 1986 laws to Plaintiff are being performed by Defendant(s) *Under The Color Of State Law* without the express authority to do so, and are being preformed with total disregard to Plaintiff's Constitutional rights.

RELIEF

WHEREFORE, Plaintiff, Gary Lee Roller, would pray for the following relief, jointly and severally against all Defendant(s):

1. Compensatory damages in the amount of thirty-five thousand dollars and no/100 ($35,000.00), for the emotional distress and the deprivation of guaranteed Constitutional rights;

2. Punitive damages that this Court and a jury may deem just and proper;

3. Declatory relief, that the Defendant(s) are applying the 1986 laws to Plaintiff in an unconstitutional manner;

4. Injunctive relief, that a permanent injunction be issued by this Honorable Court, which prohibits the

Defendant(s) and any further parole board members from applying the 1986 laws toward Plaintiff's future parole reviews;

5. Grant such other relief that this Court may deem to be just and proper.

Signed this 27 day of November, 1990.

/s/ Gary Lee Roller
Gary Lee Roller, pro-se

I declare under the penalty of perjury that the foregoing is true and correct.

11/27/90
DATE

/s/ Gary Lee Roller
Gary Lee Roller

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Gary Lee Roller, #116220 Plaintiff, v. Michael J. Cavanaugh, Executive Director of the South Carolina Department of Probation, Parole, and Pardon Services, et al. Defendants.	)	Civil Action No. 3:90-3054-15J **MOTION TO DISMISS OR FOR SUMMARY JUDGMENT** (Filed June 4, 1991)

The Defendants, Michael J. Cavanaugh and the South Carolina Department of Probation, Parole, and Pardon Services by their attorney, move the court to dismiss the above captioned cause or in the alternative to grant summary judgment in favor of the Defendants based upon the following grounds:

1. The Plaintiff has failed to state a cause of action;

2. The Plaintiff's cause of action is precluded by the Eleventh Amendment to the United States Constitution;

3. The Plaintiff's cause of action cannot be brought pursuant to 42 U.S.C. §1983;

4) The Federal Court should abstain where the Plaintiff has a clear legal remedy which he has not pursued.

5) The Defendants are immune from any liability for their official acts;

6) The Plaintiff has failed to exhaust his legal remedies which are available in the State of South Carolina.

Respectfully submitted,

/s/ Carl N. Lundberg,
CARL N. LUNDBERG, #2744
Chief Legal Counsel
S. C. Dept. of Probation,
Parole, and Pardon Services
P.O. Box 50666
Columbia, SC 29250

(803) 734-9207

Attorney for Michael J. Cavanaugh, Commissioner, and the South Carolina Department of Probation, Parole, and Pardon Services

Columbia, South Carolina
3 day of June, 1991

ENTERED
9-12-91

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Gary Lee Roller, 116220, Plaintiff, -versus- Michael J. Cavanaugh, Executive Director of the South Carolina Department of Probation, Parole, and Pardon Services, et al, Defendants.	)	Civil Action No. 3:90-3054-15J **REPORT AND RECOMMENDATION** (Filed SEP 11 1991)

This civil rights complaint brought by a state prisoner proceeding *pro se* is before the undersigned United States Magistrate Judge for a report and recommendation on the defendants' summary judgment motion under Rule 56 of the Federal Rules of Civil Procedure. 28 U.S.C. § 636(b).

The Plaintiff, Gary Lee Roller (Roller), is presently incarcerated at a facility of the South Carolina Department of Corrections. Roller was convicted in the Chester County Court of General Sessions of voluntary manslaughter and grand larceny committed on December 13, 1982. He was sentenced on March 25, 1983, to serve thirty (30) years for voluntary manslaughter and five (5) years consecutive for grand larceny. He initially became eligible for parole on October 27, 1990, pursuant to the parole eligibility statute in force on the date of his offense.

Roller received a parole hearing on October 31, 1990, at which time he was rejected for parole, notified of the reasons for the rejection, and informed that his next hearing would be October 31, 1992.

Roller brings this civil rights action pursuant to 42 U.S.C. § 1983 against Michael J. Cavanaugh, Executive Director of the South Carolina Department of Probation, Parole and Pardon Services, as well as all present members of the Pardon and Parole Board. The defendants are being sued in their official and individual capacities for compensatory and punitive damages, declaratory relief, and a court order enjoining the defendants from applying the South Carolina Omnibus Criminal Justice Improvement Act (Act) of 1986 related to the manner and timing of parole reviews to Roller.

Roller asserts that the defendants' application of the Act to him increasing the time between parole reconsideration hearings from one (1) to two (2) years is violative of the prohibition against *ex post facto* laws and denies him due process under the Constitution of the United States.

Section 24-21-645 of the South Carolina Code of Laws (Law. Co-op. 1976) made effective June 15, 1981, provided that all inmates would be reviewed for parole annually following an initial rejection for parole. That section was amended effective June 3, 1986, to provide that a violent offender would not be rescheduled for another parole hearing for a period of two (2) years from the date of his rejection.

Roller contends:

> 1. The defendants application of the 1986 laws to Roller increases the punishment he must suffer for his crimes and is thus a impermissible retroactive application in violation of the *ex post facto* clause.
>
> 2. Application of the 1986 laws to the plaintiff denies him a substantial protected liberty interest in violation of the due process clause of the fourteenth amendment of the United States Constitution.
>
> 3. The application of 1986 laws to the plaintiff violates due process and *ex post facto* clauses of the South Carolina Constitution.

On June 4, 1991, the defendants filed a motion to dismiss or for summary judgment. They argue that they are immune from liability under the eleventh amendment and not amenable to suit under § 1983. Further, they assert they are entitled to defense of qualified immunity. In addition, they argue that the plaintiff has not exhausted any state remedies as required and that the changes in parole procedures do not violate the *ex post facto* or due process clauses of the Constitution.

A copy of the defendants' motion and supporting memorandum was provided Roller on June 13, 1991, along with an explanation of dismissal and summary judgment procedures with pertinent extracts from Rules 12 and 56 of the Federal Rules of Civil Procedure similar to that required by *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975).

In response, Roller filed his opposition to the defendants' motion, memorandum in support of the opposition, his own affidavit, a motion for appointment of counsel, and an affidavit in support of motion for appointment of counsel. Roller's motion for appointed counsel was denied on July 15, 1991. Hence, it appears that the defendants' motion is ready for consideration.

A review of the record and relevant case law indicates that the defendants' summary judgment motion should be granted.

Roller's claim for damages against the South Carolina parole officials in their official capacity is barred by the eleventh amendment. *See, Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). Further, the parole officials sued in their individual capacities are entitled to absolute immunity under *Pope v. Chew*, 521 F.2d 400 (4th Cir. 1975). In *Pope*, the Fourth Circuit held that parole officials involved in the quasi-judicial function of considering parole applications are entitled absolute personal immunity. 521 F.2d at 405-06. The defendants in their individual capacities acting as parole officials are protected by the qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Further since the constitutional question raised by Roller is unsettled, qualified immunity is an acceptable alternate ground for dismissal. *See, Anderson v. Creighton*, 107 S.Ct. 3034 (1987). Nonetheless, a defendant sued in his or her capacity as a Parole Board member could be subject to an injunction under the *Ex Parte: Young*, 209 U.S. 123 (1908) (exception to eleventh amendment immunity). Roller has alleged an ongoing violation bringing his claim within the purview of the *Young* exception. *Papasan v. Allain*, 478 U.S. 265 (1986), *McConnell v. Adams*, 829 F.2d 1319 (4th

Cir. 1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 1731 (1988). Therefore, only to the extent that Roller seeks injunctive relief preventing these officials future conduct, may this action proceed.

The defendants' argument that Roller's action is designed ultimately to shorten the period of his incarceration and thus is subject to the exhaustion requirement of 28 U.S.C. § 2254(b) is unfounded. While a § 1983 suit is not a substitute for a writ of habeas corpus, here Roller seeks only consideration for parole, not release or shortening of the period of incarceration. *Prieser v. Rodriguez*, 411 U.S. 475 (1973). Under these circumstances, the Fourth Circuit has held that § 1983 may be used to challenge parole procedures. *Strader v. Troy*, 571 F.2d 1263 (4th Cir. 1978).

Initially, there is no constitutional right to parole unless the state creates a protectable liberty interest in the establishment of a parole system. *See, Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S.Ct. 2010 (1979). Such an interest arises only when a parole statute provides that specific conditions mandate release. *Damiano v. Florida Parole & Probation Commission*, 785 F.2d 929 (11th Cir. 1986).

The plaintiff has no right to parole in South Carolina. S.C. Const. Art. IV, § 14. Parole is a matter of grace bestowed by the government. *Bearden v. State*, 443 F.2d 1090 (1971). State law does not mandate parole even if certain conditions are met by an inmate. That is, the conditions listed in § 24-21-640 must all be satisfied before the Board will consider exercising their discretion to release an inmate on parole. In the event the Board

denies parole to an inmate, it is required to give the inmate written notice of the reasons that the parole was rejected. It is uncontroverted that Roller was provided with the reasons for the denial of his parole. His due process claims are without merit.

Next, Roller alleges that the application of the 1986 Act to him by the defendants violates the *ex post facto* clause of the United States Constitution. In 1982, when he committed his crimes, § 24-21-645 provided that the frequency of parole reconsideration hearings would be every twelve (12) months following an initial rejection for parole. In 1986, § 24-21-645 was amended to provide that parole reconsideration hearings for persons convicted of violent crimes as defined in § 16-1-60 also effective June 3, 1986, would be held every two (2) years following an initial rejection. It is uncontested that the defendants have applied these code sections retroactively to Roller.[1]

The United States Constitution, Art. I, § 10 states in pertinent fact: "No state . . . shall pass any bill of attainer or *ex post facto* law . . . " In *Fender v. Thompson, et al*, 883 F.2d 303 (4th Cir. 1989), the Fourth Circuit held that the *ex post facto* clause "forbids . . . the state to enact any law which imposes a punishment for an act which was not punishable at the time it was committed, or imposes additional punishment than that then prescribed." *Weaver v. Graham*, 450 U.S. 24 (1981). Two critical elements must be present for a criminal or penal law to be *ex post facto*: it must be retrospective, that is it must apply to events

---

[1] Roller's conviction for the crime of voluntary manslaughter is considered a violent crime subject to this section.

occurring before its enactment, and it must disadvantage the offender effected by it. *Id.* at 29.

Further, the Supreme Court has held:

> "[T]he prohibition of *ex post facto* laws does not extend to every change of the law that 'may work to the disadvantage of a defendant.' It is intended to secure 'substantial personal rights' from retroactive deprivation and does not 'limit the legislative control of remedies and modes of procedure which do not effect matters of substance.' (quoting *Dolbert v. Florida*, 432 U.S. 282, 293 (1977).

Portley v. Grossman, 444 U.S. 1311, 1312 (1980).

In *Gunter v. State*, the South Carolina Supreme Court in addressing this issue held:

> On this issue, we find persuasive the holding of the California Supreme Court *In Re: Jackson*, 39 Cal.3rd 464, 703 Pac.2d 100 (1985). There the court held that a statutory amendment prolonging the time before reconsideration for parole was a procedural change outside the purview of the *ex post facto* clause. The court reasoned that the amendment did not alter the criteria by which parole suitability is determined, but rather only changed the frequency with which an inmate was given to demonstrate parole suitability. By the same token, the standards governing the petitioner's parole eligibility have not been changed. Instead, only the frequency with which petitioner can be reconsidered for parole has been altered. We find no *ex post facto* violation in the application of the questioned statute to petitioner.

378 S.E.2d 443 (S.C. 1989).

No additional post-conviction punishment has been imposed because Roller's sentence has not been lengthened, his possibility of parole has not been revoked, and the conditions he must meet to be considered for parole eligibility remain the same. The only change is a procedural one controlling how often Roller's case is reviewed for parole.

Lastly, Roller's allegation that application of the Act to him is violative of the South Carolina Constitution does not provide a basis for a § 1983 suit. Section 1983 was intended to vindicate only federal rights determined under federal substantive law, not claims arising under state law. *Weller v. Department of Social Services*, 901 F.2d 387 (4th Cir. 1990); *Clark v. Link*, 855 F.2d 156 (4th Cir. 1988); *See, Paul v. Davis*, 424 U.S. 693 (1976); *Riccio v. County of Fairfax*, 907 F.2d 1459 (4th Cir. 1990).

In summary, inmates in South Carolina have no protected liberty interest in parole; lengthening of the time between parole reconsideration from one (1) to two (2) years does not offend the due process or *ex post facto* protections of the United States Constitution, and § 1983 is not available to test application of the Act to Roller under the South Carolina Constitution.

Accordingly, for the above stated reasons, it is recommended that the defendants' motion for summary judgment be granted.

Respectfully submitted,

/s/ Robert S. Carr
Robert S. Carr
United States Magistrate
Judge

Charleston, South Carolina
September 10, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

Gary Lee Roller, #116220 Plaintiff, vs. Michael J. Cavanaugh, Executive Director of the South Carolina Department of Probation, Parole, and Pardon Services et al. Defendants.	CA No. 3:90-3054-20J ORDER (Filed Nov 8 1991)

This matter is before this court with the Report and Recommendation of the United States Magistrate Judge, made in accordance with 28 U.S.C. §636(b) and Local Rule 19.02 (D.S.C.). The recommendation has no presumptive weight, and the responsibility to make a final determination remains with the United States District Court. *Mathews v. Weber,* 423 U.S. 261 (1976). The court is charged with making a *de novo* determination of those portions of the Report and Recommendation to which specific objection is made. The court may accept, reject, or modify, in whole or in part, the recommendation made by the magistrate judge or recommit the matter to him with instructions. 28 U.S.C. §636(b)(1).

The plaintiff, Gary Lee Roller ("Roller"), is presently incarcerated by the South Carolina Department of Corrections on convictions of voluntary manslaughter and grand larceny. Roller was sentenced on March 25, 1983, to serve consecutive terms of thirty (30) and five (5) years.

Roller initially became eligible for parole on October 27, 1990.

Roller received a parole hearing on October 31, 1990, at which he was rejected for parole and notified his next hearing would be October 31, 1992.

S.C. Code Ann. §24-21-645 (Law. Co-Op. 1976) at the time of Roller's sentencing provided that all inmates would be reviewed for parole annually following an initial rejection for parole. That section was amended, effective June 3, 1986, to provide that a violent offender would not be rescheduled for another parole hearing for a period of two (2) years from the date of his rejection.

Roller brought this action under 42 U.S.C. §1983 to challenge the application of the two year waiting period for review of parole from the 1986 law. Roller contends that the application of the 1986 law to him violates the *ex post facto* clauses of the United States and South Carolina Constitutions and the due process clauses of the South Carolina Constitution and the fourteenth amendment of the United States Constitution.

Both parties filed objections to the Report and Recommendation of Magistrate Judge Carr.

Roller states three objections. First, Roller contends that the magistrate judge misunderstood his claims which had the effect of amending his complaint. The court finds that Magistrate Judge Car properly understood and fairly addressed Roller's claims. This objection is without merit.

Second, Roller asserts that he should be allowed to recover monetary damages from the defendants in their individual capacities and prospective relief from the

defendants in their official capacity. The magistrate judge properly addressed each of these claims. The defendants in their individual capacities are protected by a qualified immunity. *Harlow v. Fitzgerald,* 457 U.S. 800 (1982). Roller has made no showing of a lack of good faith to defeat this immunity. Therefore, the defendants are not subject to monetary damages.

Roller contends that he should be entitled to injunctive relief under *Ex Parte Young,* 209 U.S. 123 (1908). The magistrate judge properly stated that injunctive relief was the only relief that Roller could seek. However, the fact that Roller could seek injunctive relief against the defendant's in their official capacities does not mean that he was entitled to such relief. Therefore, the second objection is without merit.

Third, Roller states that he "realleges each and every pleading, affidavit, motion, and attachment put forth in this action heretofore, as if repeated in full verbatim herein." A restatement of the allegations of the complaint is not a meritorious objection.

The defendants also objected to the Report and Recommendation of Magistrate Judge Carr. The defendants object to the conclusion that "§1983 can be used to challenge parole procedures", which is based on an interpretation of *Strader v. Troy,* 571 F.2d 1263 (4th Cir. 1978). This court finds that the magistrate judge's interpretation of *Strader* is correct and that *Strader* is the valid law of this circuit. Therefore, this objection is without merit.

Further, the defendants cite *Will v. Mich. Dept. of State Police,* 491 U.S. 58 (1989) to assert that "Section 1983 . . . does not provide a federal forum for litigants

who seek a remedy against a State for alleged deprivations of civil liberties." *Id.* at 66. However, the Supreme Court in *Will* went on to say that "a state official in his or her official capacity, when sued for injunctive relief, would be a person under §1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.'" *Id.* at 71 n. 10 (citing *Kentucky v. Graham*, 473 U.S. 159 (1985); *Ex parte Young*, 209 U.S. 123 (1908)). The claims against the defendants in their official capacities in so far as they sought injunctive relief were properly brought under §1983.[1] Therefore, this objection by the defendant is without merit.

Based on the foregoing, this court finds that the objections are without merit. Magistrate Judge Carr's Report and Recommendation is adopted and incorporated herein by reference. Therefore,

IT IS ORDERED that the defendants' motion for summary judgment is hereby granted.

IT IS SO ORDERED.

/s/ Henry M. Herlong, Jr.
Henry M. Herlong, Jr.
United States District Judge

Greenville, South Carolina
November 1, 1991

[1] This is true even though this court find that the plaintiff is not entitled to relief on the merits of the claims.

UNITED STATES DISTRICT COURT

DISTRICT OF South Carolina
Columbia Division

Gary Lee Roller

Plaintiff

V.

Michael J. Cavanaugh, Executive Director of the South Carolina Department of Probation, Parole and Pardon Services, et al.

JUDGMENT IN A CIVIL CASE

(Filed Nov 12 1991)

CASE NUMBER: 3:90-3054-20J

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to hearing before the Court. The Court having adopted the recommendation of the U.S. Magistrate Judge, and having duly heard and granted the defendants' motion for summary judgment, IT IS ORDERED AND ADJUDGED.

That summary judgment is hereby entered for defendants Michael J. Cavanaugh, Executive Director of the South Carolina Department of Probation, Parole and Pardon Service and the South Carolina Department of Probation, Parole and Pardon Service.

November 12, 1991
Date

/s/ ANN A. BIRCH
Clerk

/s/ Carol E. Moment
Carol E. Moment
(By) Deputy Clerk

PUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

GARY LEE ROLLER,
Plaintiff-Appellant,

v.

MICHAEL J. CAVANAUGH, Executive Director of the South Carolina Department of Probation, Parole, and Pardon Services; SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES,
Defendants-Appellees.

No. 91-6688

Appeal from the United States District Court
for the District of South Carolina, at Columbia.
Henry Michael Herlong, Jr., District Judge.
(CA-90-3054-3-20-J)

Argued: December 3, 1992

Decided: January 15, 1993

Before RUSSELL and HALL, Circuit Judges, and MORGAN, United States District Judge for the Eastern District of Virginia, sitting by designation.

Reversed and remanded by published opinion. Judge Hall wrote the opinion, in which Judge Russell and Judge Morgan joined.

COUNSEL

ARGUED: W. Gaston Fairey, FAIREY & PARISE, P.A., Columbia, South Carolina, for Appellant. Carl Norman Lundberg, Chief Legal Counsel, SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE & PARDON SERVICES, Columbia, South Carolina, for Appellees. **ON BRIEF:** Edwin E. Evans, Chief Deputy Attorney General, Columbia, South Carolina, for Appellees.

OPINION

HALL, Circuit Judge:

Gary Lee Roller appeals an order of the district court granting summary judgment for the defendants in Roller's 42 U.S.C. § 1983 suit challenging the frequency of his parole reconsideration hearings. We must decide whether a statutory amendment increasing the length of time between parole reconsiderations from every year to every two years is an unconstitutional *ex post facto* law if applied to prisoners whose crimes were committed before the amendment. Concluding that it is, we reverse.

I.

In early 1983, Gary Roller was convicted of voluntary manslaughter and grand larceny in South Carolina state court. Both of these crimes occurred on December 13, 1982. On March 25, 1983, he was sentenced to consecutive terms of imprisonment of thirty and five years. At that time, a South Carolina statute provided that, within ninety days of the prisoner's becoming eligible for parole, the Parole Board would review the case and determine

whether to grant parole. If the Board decided not to grant parole, "the prisoner's case shall be reviewed every twelve months thereafter for the purpose of such determination." Former S.C. Code 24-21-620 (1976 & Supp. 1981). In 1986, this statute was amended to make reconsideration of parole for violent offenders less frequent – every two years. S.C. Code § 24-21-645 (1989 & Supp. 1991). The date at which a prisoner initially becomes eligible for parole, however, was not changed.

In 1990, Roller became eligible for parole. On October 31, 1990, the Board rejected parole, and advised Roller that his next hearing would be held October 31, 1992.[1]

On December 28, 1990, Roller filed this suit under 42 U.S.C. § 1983 against the members of the Parole Board in their official and personal capacities. He sought monetary, declaratory, and injunctive relief. The gravamen of his claim was that application of the less-frequent parole review to him violated the federal constitution's prohibition of *ex post facto* laws.

The defendants moved for summary judgment. The magistrate recommended that the motion be granted. Over Roller's objections, the district court adopted the magistrate's recommendation.

Roller appeals.

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[1] We were advised at oral argument that this hearing was held, and parole was denied.

II

A.

The district court held that Roller's official-capacity claims for damages were not cognizable under § 1983, *see Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989), and that the defendants had not overstepped their qualified immunity[2] so as to subject themselves to personal liability. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982). On appeal, Roller does not challenge these rulings. Because, however, prospective relief to stop unconstitutional practices by states is available in federal courts, *Ex parte Young*, 209 U.S. 123 (1908), Roller's claims for declaratory and injunctive relief are not affected by the defendants' immunities. *Pulliam v. Allen*, 466 U.S. 522 (1984).

B.

In 1973, in the midst of an unprecedented influx of civil rights suits by prisoners, the Supreme Court held that

> when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.

---

[2] Because qualified immunity suffices to shield the defendants from personal liability, we need not decide whether the scheduling of parole reconsiderations is performance of a quasi-judicial function, for which the defendants would have absolute immunity. *See generally, Forrester v. White*, 484 U.S. 219, 225-229 (1988); *Pope v. Chew*, 521 F.2d 400, 405 (4th Cir. 1975).

Preiser v. Rodriguez, 411 U.S. 475, 509 (1973). The defendants here argue that Roller is attacking a part of his sentence – parole eligibility – and § 1983 does not provide relief. The *Preiser* distinction is important here because Roller has not exhausted his state remedies on his *ex post facto* claim – a general prerequisite to federal habeas corpus relief, but not to a § 1983 suit.

In *Strader v. Troy*, 571 F.2d 1263 (4th Cir. 1978), we held that § 1983 was the proper vehicle for a defendant who sought to preclude a state parole board from considering allegedly invalid prior convictions. Because the petitioner did not assert that he was *entitled* to parole, "now or ever," no exhaustion of the state habeas remedy was required. Like the inmate in *Strader*, Roller does not say he is entitled to parole. We follow *Strader* and find that Roller has stated a cognizable § 1983 claim.

III.

A.

The Constitution prohibits both the federal and state legislatures from passing *ex post facto* laws. U.S. Const. art I, § 9, cl.3 and § 10 cl. 1. Neither Congress nor the states may "enact any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then described.' " *Weaver v. Graham*, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri*, 4 Wall. 277, 325-26 (1867)). Though there is no constitutional requirement that a state permit parole or early release from confinement, *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979), statutes providing for parole are "part

of the law annexed to the crime at the time of the person's offense." *Schwartz v. Muncy*, 834 F.2d 396, 398 n.8 (4th Cir.1987) (quoted in *Fender v. Thompson*, 883 F.2d 303, 305 (4th Cir. 1989).

The *ex post facto* clauses are a restriction on the power of government and operate without regard to the affirmative "rights" of the individual. Consequently, it is immaterial to an *ex post facto* challenge to computation of a release or parole eligibility date that the prisoner does not have a "vested" liberty or property right in parole, "good time," or the like. *Weaver*, 450 U.S. at 29-30 (criticizing state court for rejecting *ex post facto* claim by finding no "vested right" to good time credits).

The South Carolina Supreme Court has rejected a challenge identical to Roller's. *Gunter v. State*, 298 S.C. 113, 378 S.E.2d 443 (1989).

B.

Four of our sister courts of appeals have directly addressed whether a retroactive reduction in the frequency of parole consideration violates the *ex post facto* clause. Three have held that it does, though the Ninth Circuit's opinion was vacated on other grounds and is thus a nullity. *Rodriguez v. United States Parole Comm'n*, 594 F.2d 170 97th Cir. 1979) (parole reconsideration changed from one-third point in sentence to every eighteen months; *ex post facto* clause violated as to a prisoner serving only a two-year sentence); *Watson v. Estelle*, 859 F.2d 105 (9th Cir. 1988), *vacated*, 886 F.2d 1093 (1989); *Akins v. Snow*, 922 F.2d 1558 (11th Cir.), *cert. denied*, 111 S.Ct. 2915 (1991); *but see Bailey v. Gardebring*, 940 F.2d 1150

(8th Cir. 1991), *cert. denied*, 112 S.Ct. 1516 (1992) (lead judge held that administrative rule was not a "law" subject to *ex post facto* clause; one judge concurred only in the result; the third dissented).

In *Akins*, the Eleventh Circuit considered a Georgia statute that decreased the frequency of parole hearings from once a year to once every eight years. The court held that this change affected the substantive rights of persons who committed crimes before its enactment, and was not simply a "procedural change." The court reasoned:

> Since the [parole board] is required to hold some type of parole reconsideration hearing **before** granting parole, an inmate is effectively **ineligible** for parole between two reconsideration hearings. Because an inmate is not paroled without a parole reconsideration hearing, the hearing must be considered an essential part of parole eligibility.

922 F.2d at 1562 (boldface in original).

The appellees cannot convincingly distinguish *Akins*. They concede that a seven-year increase in a prisoner's wait between reconsiderations is so long that it is substantive, but assert, "[a]s if you could kill time without injuring eternity,"[3] that a one-year wait is "procedural" and presents no *ex post facto* difficulty. *See Dobbert v. Florida*, 432 U.S. 282 (1977) (*ex post facto* clause does not "limit the legislative control of remedies and modes of

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[3] Thoreau, *Walden; or, Life in the Woods*, "Economy," *reprinted in Walden and Other Writings by Henry David Thoreau* 111 (Bantam Classic ed. 1981).

procedure which do not affect matters of substance").[4] We are not willing to disparage the "substance" of a year, especially a year in prison.

Defendants also point out that Roller becomes and remains "eligible" for parole just as he would have under the law in effect when he committed his crimes. The defendants do not, however, identify any benefit flowing from the status of "elibigility" other than the right to be heard and considered for parole. Eligibility without consideration is a cold comfort.

This circuit has no case so directly on point as *Akins*; however, two cases provide us considerable guidance. In *Schwartz v. Muncy*, 834 F.2d 396 (4th Cir. 1987), the court reviewed a Virginia statute that increased the time before an inmate would become eligible for parole on existing sentences if the inmate committed a third offense after the statute's effective date. The court held that the statute increased the punishment for a crime completed before its enactment, and thus the statute violated the *ex post facto* clause.

In *Fender v. Thompson*, 883 F.2d 303 (4th Cir. 1989), a state inmate was serving a life sentence. Under the state law in effect at the time of the crime, the inmate was

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[4] *Cf.* cases in which changes in the manner of reimposing sentence after the original sentence is set aside have been held to present no *ex post facto* problem. *Collins v. Youngblood*, 497 U.S. 37 (1990) (Texas statute allowing appellate court to reform illegal sentence); *Evans v. Thompson*, 881 F.2d 117 (4th Cir. 1989), *cert. denied*, 110 S.Ct. 3255 (1990) (Virginia statute providing that capital defendants whose sentences are vacated may be resentenced before a new jury).

eligible for parole after fifteen years. The state legislature later passed a law revoking the parole eligibility of inmates who escaped while serving life sentences. The inmate escaped after passage of the new law, and his eligibility for parole was revoked. We held that, though the state could punish escape in almost any manner it pleased, it could not do so by increasing the punishment for crimes committed before the new escape statute was enacted. We stated this general rule:

> [S]tatutes enacted or amended after a prisoner was sentenced cannot be applied to alter the conditions of or revoke his or her preexisting parole eligibility. . . .

883 F.2d at 306. South Carolina has undoubtedly applied its new statute to "alter the conditions of . . . [Roller's] preexisting parole eligibility." Indeed, it has effectively "revoked" eligibility for an extra year following a denial.

The judgment is reversed, and the case is remanded with instructions to grant declaratory, and, if necessary, injunctive,[5] relief in favor of Roller. Our decision does not, of course, require or even suggest that Roller be paroled. South Carolina need never parole him, so long as it considers the question every year.

REVERSED AND REMANDED

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[5] *See Steffel v. Thompson*, 415 U.S. 452, 468-471 (1974) (district court may anticipate that state authorities will comply with a declaratory judgment and thereby forego issuing an injunction).

S.C. Code Ann. § 24-21-610 (1976) enacted June 15, 1981 (Parole Eligibility)

"Section 24-21-610. In all cases cognizable under this chapter the Board may, upon ten days' written notice to the solicitor and judge who participated in the trial of any prisoner, parole such prisoner convicted of a felony and imprisoned in the state penitentiary, in any jail or upon the public works of any county:

(1) Who, if sentenced for not more than thirty years, shall have served at least one third of the term;

(2) Who, if sentenced to life imprisonment or imprisonment for any period in excess of thirty years, shall have served at least ten years;

(3) Who, if he is a first offender and is sentenced for an indeterminate term shall have served the minimum for which he was sentenced.

Provided, if after January 1, 1984, the Board shall find that the statewide case classification system provided for in Chapter 23 of this title has been implemented, that an intensive supervision program for parolees who require more than average supervision has been implemented, that a system for the periodic review of all parole cases in order to assess the adequacy of supervisory controls and of parolee participation in rehabilitative programs has been implemented, and that a system of contracted rehabilitative services for parolees is being furnished by public and private agencies, then in all cases cognizable under this chapter the Board may, upon ten days' written notice to the solicitor and judge who participated in the trial of any prisoner, to the victim or victims, if any, of such felony, and to the sheriff of the county where the

prisoner resides or will reside, parole such prisoner convicted of a felony and imprisoned in the state penitentiary, in any jail or upon the public works of any county:

(1) Who, if sentenced for the crime of murder, armed robbery, criminal sexual assault, assault and battery with intent to kill or kidnapping, shall have served at least one third of the term; provided, that for any other crime the prisoner shall have served at least one fourth of the term;

(2) Who, if sentenced to life imprisonment or imprisonment for any period in excess of forty years shall have served at least ten years;

(3) Who, if he is a first offender and is sentenced for an indeterminate term shall have served the minimum for which he was sentenced.

Provided, further, that the provisions of this section shall not affect the parole ineligibility provisions for murder and armed robbery as set forth respectively in Section 16-3-20 and Section 16-11-330.

Provided, further, that in computing parole eligibility, no deduction of time shall be allowed in any case for good behavior, but that after June 30, 1981, there shall be deductions of time in all cases for earned work credits, notwithstanding the provisions of Section 16-3-20, Section 16-11-330 and Section 24-13-230.

Notwithstanding the provisions of this section, the Board may parole any prisoner not sooner than one year prior to the prescribed date of parole eligibility when, based on medical information furnished to it, the Board determines that the physical condition of the prisoner concerned is so serious that he would not be reasonably

expected to live for more than one year. Notwithstanding any other provision of this section or of law, no prisoner who has served a total of ten consecutive years or more in prison shall be paroled until the Board has first received a report as to his mental condition and his ability to adjust to life outside the prison from a duly qualified psychiatrist or psychologist."

S.C. Code Ann. § 24-21-620 (1976)
enacted June 15, 1981 (parole hearing rescheduling)

"Section 24-21-620. Within the ninety-day period preceding a prisoner having served one-fourth of sentence, the Board, either acting in a three-member panel or meeting as a full Board, shall review the case, regardless of whether or not any application has been made therefor, for the purpose of determining whether or not such prisoner is entitled to any of the benefits provided for in this chapter; provided, that in cases of prisoners in confinement due to convictions for nonviolent crimes, an administrative hearing officer may be appointed by the Commissioner of Paroles and Pardons to review the case who shall submit to the full Board written findings of fact and recommendations, which shall be the basis for a determination by the Board. Upon an affirmative determination, the prisoner shall be granted a provisional parole. Upon a negative determination, the prisoner's case shall be reviewed every twelve months thereafter for the purpose of such determination.

S.C. Code Ann. § 24-21-645 (1976) enacted June 3, 1986 (parole hearing rescheduling)

"Section 24-21-645. The Board may issue an order authorizing the parole which must be signed either by a majority of its members or by all three members meeting as a parole panel on the case, ninety days prior to the effective date of the parole; provided that at least two-thirds of the members of the Board must authorize and sign orders authorizing parole for persons convicted of a violent crime as defined in Section 16-1-60. A provisional parole order shall include the terms and conditions, if any, to be met by the prisoner during the provisional period and terms and conditions, if any, to be met upon parole. Upon satisfactory completion of the provisional period, the Executive Director or one lawfully acting for him, shall issue an order, which, if accepted by the prisoner, shall provide for his release from custody.

Provided, that upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole."

S.C. Code Ann. § 24-21-650 (1976) enacted June 3, 1986 (parole hearing rescheduling)

"Section 24-21-650. The Board shall issue an order authorizing the parole which must be signed by at least a

majority of its members, with terms and conditions, if any; provided, that at least two-thirds of the members of the Board must sign orders authorizing parole for persons convicted of a violent crime as defined in Section 16-1-60. Thereupon the supervisor of parole, or one lawfully acting for him, shall issue a parole order, which, if accepted by the prisoner, shall provide for his release from custody.

Provided, that upon a negative determination of parole, prisoners in confinement for a violent crime as defined in Section 16-1-60 must have their cases reviewed every two years for the purpose of a determination of parole."

S.C. Code Ann. § 16-1-60 (1976) enacted June 3, 1986 (Definition of violent crime)

"Section 16-1-60. For purposes of definition under South Carolina law a violent crime includes the offenses of murder, criminal sexual conduct in the first and second degree, assault and battery with intent to kill, kidnapping, voluntary manslaughter, armed robbery, drug trafficking as defined in Section 44-53-370(e), arson in the first degree, burglary in the first degree, and burglary in the second degree under Section 16-11-312(B)."

Supreme Court, U.S.
FILED
JUL 6 1993
OFFICE OF THE CLERK

No. 92-1510

In The

Supreme Court of the United States

October Term, 1993

MICHAEL J. CAVANAUGH, Executive Director of the South Carolina Department of Probation, Parole, and Pardon Services; South Carolina Department of Probation, Parole, and Pardon Services,

Petitioners,

vs.

GARY LEE ROLLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONERS' BRIEF ON THE MERITS

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26pp

QUESTIONS PRESENTED FOR REVIEW

I.

IS FEDERAL JURISDICTION FOR RESPONDENT'S CHALLENGE OF SOUTH CAROLINA'S PAROLE RELEASE SYSTEM PROPER UNDER 42 U.S.C. § 1983, OR SHOULD IT HAVE BEEN BROUGHT UNDER HABEAS CORPUS AFTER STATE REMEDIES WERE EXHAUSTED?

II.

IS THE 1986 STATUTORY AMENDMENT TO THE SOUTH CAROLINA CODE, WHICH INCREASES THE TIME BETWEEN PAROLE CONSIDERATION HEARINGS FROM ONE TO TWO YEARS FOR OFFENDERS CONVICTED OF VIOLENT CRIME, AN INSUBSTANTIAL PROCEDURAL CHANGE OUTSIDE THE PURVIEW OF THE *EX POST FACTO* CLAUSE, AS THE SUPREME COURT OF SOUTH CAROLINA HELD IN *GUNTER V. STATE*, 378 S.E.2d 443 (1989)?

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vs.

GARY LEE ROLLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONERS' BRIEF ON THE MERITS

CITATION OF THE OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

Roller v. Cavanaugh, et al., Case 3:90-3054-20J. Opinion and Order of the United States District Court for the District of South Carolina filed November 8, 1991, is reprinted in the Joint Appendix (J.A. 23).

Roller v. Cavanaugh, et al., Case 3:90-3054-20J. Judgment of the United States District Court for the District of South

Carolina filed November 12, 1991, is reprinted in the Joint Appendix (J.A. 27).

Roller v. Cavanaugh, et al., 984 F.2d 120 (4th Cir. 1991) is reprinted in the Joint Appendix (J.A. 28).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE UNITED STATES SUPREME COURT IS INVOLVED

The petitioner has been granted review of the January 15, 1993, opinion and judgment of the United States Court of Appeals for the Fourth Circuit. The petitioner filed a petition for writ of certiorari with the United States Supreme Court on March 8, 1993, and it was granted on May 24, 1993.

Jurisdiction is conferred on the United States Supreme Court by 28 U.S.C. § 1254(1) and 28 U.S.C. § 1257(8), as characterized in Supreme Court Rule 10.1(a). The former statute allows this Court to review, upon petition for writ of certiorari, cases of the courts of appeals, before or after judgment has been rendered. The latter statute allows the Court to review, also upon petition for writ of certiorari, final judgments rendered by the highest court of a state in which a decision could be had, where the validity of a state statute is being drawn in question on the ground of its being repugnant to the Constitution. In this matter, South Carolina Code Sections 16-1-60, 24-21-645, 24-21-650 are being drawn in question on the ground that their application to the Respondent violates the *Ex Post Facto* Clause. Further, this is a matter in which a United States court of appeals has decided a

federal question in a way that conflicts with a state court of last resort. The Fourth Circuit's decision squarely conflicts with the South Carolina Supreme Court's decision in *Gunter v. State*, 298 S.C. 113, 378 S.E.2d 443 (1989), on the *ex post facto* question; and on the threshold question of federal jurisdiction under 42 U.S.C. § 1983, it conflicts with this Court's decision in *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and its line.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

Article I, § 9 clause 3 provides "No . . . *ex post facto* law shall be passed."

1981 Act No. 100, § 9, *S.C. Code Ann.*, § 24-21-610 (1976), enacted June 15, 1981 (parole eligibility) is set forth in J.A. at 37.

1981 Act No. 100, § 10, *S.C. Code Ann.*, § 24-21-620 (1976), enacted June 15, 1981 (parole hearing rescheduling) is set forth in J.A. at 39.

1986 Act No. 462, § 31, *S.C. Code Ann.*, § 24-21-645 (1976), enacted June 3, 1986 (parole hearing rescheduling) is set forth in J.A. at 40.

1986 Act. No. 462, § 32, *S.C. Code Ann.*, § 24-21-650 (1976), enacted June 3, 1986 (parole hearing rescheduling) is set forth in J.A. at 40.

1986 Act. No. 462, § 33, *S.C. Code Ann.* § 16-1-60 (1976), enacted June 3, 1986 (definition of violent crime) is set forth in J.A. at 41.

STATEMENT OF THE CASE

The respondent, Gary Lee Roller, was convicted of voluntary manslaughter and grand larceny in the Chester County Court of General Sessions for the State of South Carolina. Both crimes were committed on December 13, 1982. Roller was sentenced on March 25, 1983. (J.A. 6) On October 27, 1990, Roller became eligible for parole under the parole eligibility statute in force on December 13, 1982, the date he committed his crimes. (J.A. 37) That parole eligibility date has not changed.

When Roller committed his crimes, the procedural law governing the rescheduling of parole hearings following a rejection set the time at one year. *S.C. Code Ann.* § 24-21-620 (1976), as amended. (J.A. 39) Effective June 3, 1986, the law controlling the rescheduling procedure was changed to require a two-year period between parole hearings for violent offenders. *S.C. Code Ann.* §§ 24-21-645, 24-21-650. (J.A. 40) At the same time, the South Carolina General Assembly enacted *S.C. Code Ann.* § 16-1-60, which enumerated those crimes deemed to be violent and included in that enumeration the crime of voluntary manslaughter. (J.A. 41) The punishment for voluntary manslaughter, including parole eligibility, however, remained exactly what it had been when Roller committed that crime in 1982. The South Carolina Supreme Court ruled in *Gunter v. State*, 298 S.C. 113, 378 S.E.2d 443 (1989), that the decrease in the frequency of parole hearings for violent offenders was a permissible procedural change and did not violate the *Ex Post Facto* Clause of the Constitution.

SUMMARY OF THE ARGUMENT

This case raises two questions. The first question invites the Court to revisit *Preiser v. Rodriguez*, 411 U.S. 475 (1973), and the problem of defining the line between federal jurisdiction under 42 U.S.C. § 1983 of the Civil Rights Act and federal Habeas Corpus. As presented for the Court's review, the question is whether federal jurisdiction for the Respondent's challenge of a South Carolina law that decreases the frequency of his parole reconsideration hearings from one year to two years is properly founded on Section 1983; or, whether the Respondent's challenge reaches the very "core of habeas corpus" and, as such, should require him to exhaust the remedies available to him in the state courts of South Carolina. The Fourth Circuit, adhering to the interpretation it gave *Preiser* in the case of *Strader v. Troy*, 571 F.2d 1263 (4th Cir. 1978), held that federal jurisdiction to hear the prisoner's petition was properly founded on § 1983.

We think the Fourth Circuit erred and should be reversed. The *Strader* interpretation of this Court's decision in *Preiser* expands federal jurisdiction under Section 1983 in these prisoner petition cases far beyond the holding in *Preiser*. In *Preiser*, this Court held that "when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus." And a speedier release, we think, is just what the Respondent is seeking when he demands a more frequent parole review–whether he says it in so many words, or not. That, after

all, is what his *ex post facto* challenge, at its core, seeks to achieve.

We must look to the *core* of the Respondent's claim, not merely to the language in which he couches that claim. The Fourth Circuit, relying on *Strader*, ignores the core of the Respondent's claim and sees only the language. In this view, the Fourth Circuit's analysis might fairly be summarized as follows: The Respondent never comes out and says he is seeking a speedier release; therefore, that's not what he's seeking. *Preiser* looks deeper, to the bedrock of the claim. As demonstrated by the Fourth Circuit's decision below, and indeed by the wide difference of opinion expressed by federal courts in every circuit when confronted with a *Preiser* puzzle, this Court, we suggest, needs once again to take the measure of *Preiser's* depth to some fathom of greater precision. At bottom, *Preiser* was deeply concerned with the larger principles of federalism and comity between the federal government and the governments of the several states. The Fourth Circuit's decision, we believe, effectively distorts these principles, under which, when viewed in accord with the teachings of *Preiser*, this case should never have gained entry in the federal courts.

The second question goes to the merits of the Respondent's claim: Whether or not a 1986 statutory amendment to the South Carolina Code, which increases the time between parole reconsideration hearings from one to two years for offenders convicted of violent crime, is an insubstantial procedural change outside the purview of the *Ex Post Facto* Clause. The South Carolina Supreme Court, in *Gunter v. State*, 378 S.E.2d 443 (1989), a case directly on point, held that the change presented no

ex post facto violation. The Fourth Circuit disagreed, effectively overruling South Carolina's highest court.

We believe that the Fourth Circuit's decision on the merits was error. The Fourth Circuit oversimplified by equating reconsideration for parole with eligibility for parole. The two are not the same, and the difference is absolutely crucial to a correct analysis of the *ex post facto* problem presented here. When reconsideration for parole is equated with parole eligibility the analysis comes to an end, because parole eligibility attaches to the punishment. A change in parole eligibility, applied retroactively to the disadvantage of the prisoner, violates the constitutional prohibition.

But the point is irrelevant, because parole eligibility was never at issue here. Respondent's parole eligibility has remained unchanged from the date of his conviction and sentencing. If we fix our attention on the relevant–the scheduling of parole reconsideration hearings–we arrive at this Court's *ex post facto* analysis in *Collins v. Youngblood*, 497 U.S. 37 (1990). In *Collins*, the Court purposefully reached back to the "original understanding" of the *Ex Post Facto* Clause, expressed in *Calder v. Bull*, 3 Dall. 386 (1798), to reject the increasingly wide-spread notion that any change which alters the situation of a party to his disadvantage violates the Clause. In place of this mistaken idea, the Court substituted the notion that the *Ex Post Facto* Clause "was intended to secure substantial personal rights against arbitrary and oppressive legislation." This idea allows for a flexible case-by-case approach. When this approach is applied to the particular facts presented in this case, we believe that the change, though retroactive, is not one of so substantial a moment

as to violate any personal rights of the Respondent intended to be secure against arbitrary and oppressive legislation. The Fourth Circuit simply avoids the real question altogether.

Should the matter go to the merits, we would ask the Court to reverse the Fourth Circuit on the *ex post facto* question and correct this error. Should it not go to the merits because the Court finds jurisdiction improperly founded on Section 1983, we would ask for an order vacating the Fourth Circuit's opinion and judgment, to ensure that it will have no binding effect.

I.

THE PRISONER'S CHALLENGE OF SOUTH CAROLINA'S PAROLE RELEASE SYSTEM REACHES THE VERY "CORE OF HABEAS CORPUS" AND, BECAUSE IT DOES, FEDERAL JURISDICTION IS NOT PROPER UNDER 42 U.S.C. § 1983.

Section 1983 is not available to test the application of the challenged parole law. The action is cognizable only in habeas corpus. *Preiser v. Rodriguez*, 411 U.S. 475 (1973), states the rule that controls here:

> [W]e hold today that when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release *or a speedier release* from that imprisonment, his sole federal remedy is a writ of habeas corpus. [emphasis added]

Id. This holding forecloses Respondent's § 1983 action here. *Preiser* also teaches that "a § 1983 is a proper remedy for a state prisoner who is making a constitutional

challenge to the conditions of his prison life, but not to the fact or length of his custody." *Id.* at 499. The District Court relied on *Strader v. Troy*, 571 F.2d 1263 (4th Cir. 1978), which incorrectly interprets *Preiser*. The Fourth Circuit held in *Strader* that *Preiser* stands for the proposition that "§ 1983 may be used to challenge parole procedures" only when the prisoner seeks "consideration for parole." Relying thus on *Strader*, the District Court was then able to conclude that Roller's use of § 1983 was proper because he "does not say he is entitled to parole."

But in fact that is precisely his claim–that he is being unlawfully restrained or confined by being denied an annual parole consideration hearing. He is seeking to shorten his confinement. Historically, this issue has always been addressed by habeas corpus, not § 1983. In order to get into the federal courts on § 1983, Roller strenuously denies that what he seeks is his release from prison. However, his claim that South Carolina has violated the *Ex Post Facto* Clause of the Constitution appears to be predicated on either of two premises: that annual parole consideration hearings are a part of his punishment and that by extending the interval between hearings, his punishment has been increased; or that the retroactive denial of an annual parole hearing has substantially disadvantaged him. Either premise asks the Court to focus on the notion that the relief he seeks in his complaint controls whether the claim itself lies in habeas or § 1983. He seeks thereby to divert attention from the core of his complaint, which is nothing other than a challenge to the duration of his physical imprisonment, a challenge which only habeas can address. *See Del Raine v.*

Carlson, 826 F.2d 698, 702 (7th Cir. 1987); *Wilson v. Lockhart*, 949 F.2d 1051 (8th Cir. 1991); *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984).

Roller cannot have it both ways. Either he is challenging the increase in the time between his parole hearings as constituting an *ex post facto* violation when applied to him, in which case the action lies solely in habeas corpus (*Preiser*, 411 U.S. at 500) and must be played out in the South Carolina state courts. Or he is not challenging that increase, in which case it is a mystery just what he might be challenging as the retroactive disadvantage supposed to be substantial enough to violate the *Ex Post Facto* Clause. It is clear that the core of his *ex post facto* challenge, which attacks the retroactively applied decrease in the frequency of his parole consideration hearings, is a challenge of his future restraint, in order to obtain for himself an earlier release. To call it anything else is semantic subterfuge. The Fourth Circuit itself has said as much in cases coming after *Strader* and interpreting *Preiser*. *Leonard v. Hammond*, 804 F.2d 838 (4th Cir. 1986); *Todd v. Baskerville*, 712 F.2d 70 (4th Cir. 1983); *Alexander v. Johnson*, 742 F.2d 117 (4th Cir. 1984). The Eighth Circuit has well observed that the chance for an earlier parole release, or the chance that a sentence might be commuted to a term of years, falls within habeas corpus. The Eighth Circuit justifies this extension of Preiser on the grounds that a state court system should have the first opportunity to decide the merits of the underlying constitutional issue. *Wilson v. Lockhart*, 949 F.2d 1051 (8th Cir. 1991).

Insofar as *Strader* ignores all this, it simply gets *Preiser* wrong. And in so doing, *Strader* needlessly compounds the problem, already "difficult enough," *Hamlin v. Warren*, 664 F.2d 29, 33 (4th Cir. 1981), *cert. denied*, 455 U.S. 911 (1982), confronting state and federal courts alike: How to sort through the frustrating conflict between the civil rights and habeas corpus remedies for state prisoners. The heart of this conflict and, more important, how we finally resolve the conflict, implicates our deepest concern for and understanding of certain fundamental notions of federalism and all that that bedrock principle entails in the way of comity between the federal government and the several states. To rely on *Strader*, we believe, undermines federalism and upsets the delicate balance which comity helps to keep. *Braden v. 30th Judicial Circuit of Kentucky*, 410 U.S. 484 (1973) (exhaustion of state-court remedies ensures comity between federal and state courts). For, what *Strader* suggests is that South Carolina's right to exercise concurrent jurisdiction with the federal courts in deciding questions of federal constitutional law need not be accorded the full respect that federalism says is its due, and may in fact be ignored altogether whenever a state prisoner, crafty enough to capitalize on the confusion now troubling the federal courts, renames his habeas corpus petition a § 1983 claim for relief.

The Court should also recognize that there is a further obstacle in the limitations on suits against the states imposed by the Eleventh Amendment. As this Court stated in the leading case of *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989), "Section 1983 provides a

federal forum to remedy many deprivations of civil liberties, but it does not provide a federal forum for litigants who seek a remedy against a State for alleged deprivations of civil liberties." The Eleventh Amendment, as the Court put it, "bars such suits unless the State has waived its immunity." *Id.* And South Carolina, we would assure the Court, has never waived its immunity here. Further, although *Will* suggests that an action against a state official in his official capacity for prospective injunctive relief under § 1983 is proper because such an action would not be treated as an action against the state, the suggestion doesn't fit the case here. *Id.* at 2311, n.10. What Roller is challenging is not the official capacity action of a state official; what he is challenging is the system South Carolina has set up for reviewing paroles after a rejection. The difficulty in relying on *Strader* is thus complicated. And the only way out for the Court, we would suggest, is for the Court to overrule the Fourth Circuit's reliance on *Strader* in favor of the lucid reasoning expressed in *Preiser* and well followed by the Fourth Circuit in *Todd* and *Leonard*.

The analysis by which cases are included within or excluded from § 1983 is difficult at best. Focusing on the distinction between the nature of the complaint and the nature of the relief is essential. This focus does not, however, always yield a bright-line test. A finer focus may be necessary. If the state has provided a specific legal remedy to address problems arising out of specific issues such as parole, then exhaustion should be required in all cases where the inmate is seeking release or earlier release from confinement. If a state has not provided a

remedy, the debate goes on. This Court has often emphasized that the states should be allowed to experiment and develop their own procedures. *See Gerstein v. Pugh*, 420 U.S. 103, 123 (1987); *Wolff v. McDonnell*, 418 U.S. 539 (1974); *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). Finally, it is crucial for the Court to remember that South Carolina has in place adequate state-law remedies–the Uniform Post-Conviction Procedure Act, *S.C. Code Ann.* § 17-27-10 *et seq.* and the Tort Claims Act, *S.C. Code Ann.* § 15-78-10 *et seq.*–that have always been available to Roller. He need only have availed himself of those remedies, which he has chosen not to do. Instead, Roller resorts to the Civil Rights statute in order to circumvent the exhaustion requirements of the habeas corpus statute. For this Court to countenance such highjinks even for a moment would return us to the state of affairs that existed in 1971, before *Preiser* dealt with the problem. It was a state of affairs that led one judge of the Second Circuit to lament, "[s]tate prisoners are increasingly resorting to the Civil Rights statutes in order to circumvent the [exhaustion] requirements of [the habeas corpus statute]." *Rodriguez v. McGinnis*, 451 F.2d 730 (2d Cir. 1971). The situation, of course, was later corrected when the Court reversed in *Preiser*. The reasoning that should guide the Court's deliberations here is first stated in *Preiser*. Certainly the Fourth Circuit decision does serious harm to federal-state comity. South Carolina therefore requests that this Court reverse the Fourth Circuit and rule that a challenge to the denial of annual parole consideration hearings can only be brought under the habeas corpus statutes after exhaustion of state remedies.

II.

AN INCREASE IN THE TIME BETWEEN PAROLE CONSIDERATION HEARINGS FROM ONE TO TWO YEARS, APPLIED RETROACTIVELY, IS AN INSUBSTANTIAL PROCEDURAL CHANGE OUTSIDE THE PURVIEW OF THE *EX POST FACTO* CLAUSE.

The *ex post facto* question isn't as simple as Roller and the Fourth Circuit have made it out to be. The Fourth Circuit wrongly equates parole eligibility in South Carolina with parole reconsideration. Once this equation is made, it is but a short step to the conclusion that the statutory change in question violates the *ex post facto* prohibition. It is a short step because the equation, albeit an erroneous one, puts the question squarely under the well-established rule that parole eligibility is a substantive matter and attaches to the punishment. Change parole eligibility retroactively and to the prisoner's disadvantage, and the prohibition against *ex post facto* laws is violated.

True enough. But the point is wholly irrelevant to the question here. The change in the procedure setting the time between parole consideration hearings is a matter of great importance. But it is qualitatively and quantitatively different from a change in parole eligibility. In South Carolina, once a prisoner becomes eligible for parole on his sentence the eligibility vests; thereafter, he is reconsidered for parole every year. In South Carolina, a prisoner becomes *eligible* for parole on his sentence only once; thereafter, he is reconsidered for parole every year (in the case of non-violent offenders) or every two years (in the case of violent offenders). See *S.C. Code Ann.* §§ 24-21-645 and 24-21-650 (1976). (J.A. 40) Roller's date

of *eligibility* for parole has not changed; that date was fixed from the start. *See S.C. Code Ann.* § 24-21-610 (1976), as amended. (J.A. 37) What has changed is the procedure governing the interval between parole hearings after a rejection. For Roller that interval used to be one year (see § 24-21-620); now it is two years (see § 24-21-645). (J.A. 39, 40 respectively) This is all that has been changed. No punishment has been added to Roller's original sentence after the fact. His sentence has not been lengthened. His parole eligibility has not been revoked or altered in any way. No "gain time" credits have been lost retroactively. As the Supreme Court of South Carolina found in *Gunter v. State*, 298 S.C. 113, 378 S.E.2d 443 (1989), "the standards governing petitioner's parole eligibility have not been changed. Instead, only the frequency with which petitioner can be reconsidered for parole has been altered." The only change in Roller's situation is just this and nothing more–an insubstantial procedural change determining how frequently he will be reconsidered for parole.

South Carolina concedes that this change does operate to the prisoner's disadvantage, but it most certainly does not offend the *Ex Post Facto* Clause. Not all retroactive changes offend, a point well-established in the precedent of this Court:

> [T]he prohibition of *ex post facto* laws does not extend to every change of law that "may work to the disadvantage of a defendant." It is intended to secure "substantial personal rights" from retroactive deprivation and does not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance."

Portley v. Grossman, 444 U.S. 1311, 1312 (1980), *quoting Dobbert v. Florida*, 432 U.S. 282, 293 (1977). *See also, Miller v. Florida*, 482 U.S. 423 (1987); *Beazell v. Ohio*, 269 U.S. 167, (1925); *Hopt v. Utah*, 110 U.S. 574, 590 (1884).

This Court reminds us in *Collins v. Youngblood*, 497 U.S. 37, (1990), that we must go back to the beginnings of *ex post facto* analysis, to clear the books of much of the confusion that has arisen in recent years. In *Beazell v. Ohio*, 269 U.S. 167, 171 (1925), this Court confidently summarized the general rule of *ex post facto* analysis, which had its beginning in *Calder v. Bull*, 3 Dall. 386 (1798):

> It is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto* [citations omitted].

Collins, which goes back to *Calder* via *Beazell*, reminds us of the Court's own "original understanding" of the *Ex Post Facto* Clause. *Id.* at 42. That original understanding rejects the notion–now increasingly current in some circuits, and among them, the Fourth Circuit, in particular–that any change which alters the situation of a party to his disadvantage effectively violates the *Ex Post Facto* Clause. *Id.* at 49. *Collins* emphasizes, in both its majority and concurring opinions, that the *Ex Post Facto* Clause "was intended to secure substantial personal rights

against arbitrary and oppressive legislation." *Id.* at 46 and 57, *quoting Malloy v. South Carolina*, 237 U.S. 180, 183 (1915). Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition "cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree." *Collins* at 57, *quoting Malloy*.

The Fourth Circuit's reasoning leaves no room for this tried and true distinction. It leaves no room for case-by-case analysis of *ex post facto* problems based on the countless variations of fact these cases present. It also leaves no room for case-by-case analysis based on the numerous variations of law within the several states. The Fourth Circuit's analysis reduces all levels of complexity to the lowest common denominator of simplicity: all changes in the law which operate retroactively to the disadvantage of the convicted criminal, no matter how slight, violate the prohibition against *ex post facto* laws. Furthermore, the Fourth Circuit's simplistic analysis effectively homogenizes all state laws in such a way as to obliterate their distinctive differences. This reduction of differences for the sake of easy analysis ignores all state lines and state laws. Ultimately, it discourages states from once-permissible experimentation.

Such a reduction occurs when the Fourth Circuit likens the case of *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991), to this case. Whether the Fourth Circuit sees it or not, this case is distinct from *Akins*, and the distinction is based on an important matter of substance and degree, one which this Court has recognized under *Collins v. Youngblood*. As a matter of law and fact, the situation presented in *Akins* is vastly different from the situation

here. In *Akins*, the interval between parole reconsideration hearings after a denial was increased from one year to *eight* years. This was even longer than it took to become eligible for parole in the first instance, which was seven years in Akins' case. The Eleventh Circuit equated the period between parole hearings with parole eligibility itself. It did so on the basis of its finding that the Georgia legislature "considers a parole reconsideration hearing an essential and important part of parole eligibility." 922 F.2d at 1562. It was then easy for the *Akins* Court to conclude that the change increased the punishment retroactively and therefore violated the prohibition against *ex post facto* laws. It is important to emphasize, once again, that in South Carolina *parole eligibility* and *parole reconsideration* are statutorily two different things, separate and distinct.

The Fourth Circuit's decision, however, ignores this crucial distinction between parole eligibility and the scheduling of parole consideration hearings. In doing so, the Fourth Circuit, without expressly saying so, concludes that a change in the scheduling of parole consideration hearings is the same thing as a change in the inmate's parole eligibility (as the *Akins* Court held) and therefore is a violation of the *Ex Post Facto* Clause. The sweeping import of the Fourth Circuit's analysis is that no change in a state's parole procedure which disadvantages an inmate can be made. This result conflicts with the holding in *Collins*, as well as the holdings in *Dobbert* and *Portley*. *Supra*.

South Carolina would not deny that even under its own parole system such a change as was at issue in *Akins* would violate the *Ex Post Facto* Clause. Clearly, any

increase of seven years, from one to eight years between parole reconsideration hearings, operates as a *substantial* disadvantage by denying the inmate a meaningful opportunity for a parole hearing. *See Rodriguez v. U.S. Parole Commission*, 594 F.2d 170, 174-175 (7th Cir. 1979). Such a degree of change is of sufficient moment to transgress the constitutional prohibition. Indeed, a change in parole review potentially far more severe than the one before the Court here–a denial of annual parole review where the law had previously provided for such review–was recently upheld by the Eighth Circuit, reviewing a change in Minnesota's parole release mechanism, as presenting no *ex post facto* violation. *See Bailey v. Gardebring*, 940 F.2d 1150 (8th Cir. 1991), *cert. denied, Bailey v. Noot*, 112 S.Ct. 1516 (1992). In *Bailey*, the prisoner lost not only his annual parole review but any scheduled date of review. The Eighth Circuit went so far as to hold that Minnesota's parole regulations were not laws for the purpose of the *Ex Post Facto* Clause. *Id.* South Carolina's parole law does not go anywhere near this extreme. This is how *Collins* would approach the *Akins* problem. Looking at the facts of the case at bar, *Collins* would say that nothing of the kind has occurred here. Roller has had, and still enjoys, a meaningful opportunity for parole under South Carolina's system of paroles.

South Carolina has more freedom than Georgia to experiment with changes in *parole reconsideration*, because South Carolina's parole laws do not make parole reconsideration an integral or essential part of parole eligibility, as do Georgia's parole laws. South Carolina should not lose its legitimate freedom to experiment with its parole system in the way that it has distinguished

between parole reconsideration hearings for violent and non-violent offenders. South Carolina will lose a large part of that legitimate freedom to experiment if the Fourth Circuit's holding is affirmed. This Court has well recognized that the several states should be encouraged to develop their own parole systems and be allowed to experiment with ways of improving those parole systems. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979); *Gerstein v. Pugh*, 420 U.S. 103 (1975). *Wolff v. McDonnell*, 418 U.S. 539 (1974). The Fourth Circuit's approach to *ex post facto* analysis, as evinced here, undermines this Court's wise concern for the right of every state to fashion its own parole system, leaving to each state as much freedom as possible under the federal constitution. The Court should find, therefore, that this case presents no violation of the *Ex Post Facto* Clause and reverse the Fourth Circuit's decision.

CONCLUSION

Based upon the foregoing reasons, the judgment of the Fourth Circuit Court of Appeals should be reversed. This Court should hold that 42 U.S.C. § 1983 does not afford a jurisdictional avenue to challenge South Carolina's parole system, and it should further hold that South Carolina's retroactive application of a two-year wait between parole consideration hearings does not violate the *Ex Post Facto* Clause.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 13 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

PAUL CASPARI and JEREMIAH W. (JAY) NIXON,	)	
Petitioners,	)	No. 92-1500
v.	)	
CHRISTOPHER BOHLEN,	)	
Respondent.	)	

RESPONDENT'S MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

COMES NOW Respondent Christopher Bohlen, by and through counsel, to respectfully request this Court grant him leave to proceed in forma pauperis in accordance with Rule 39.1, Supreme Court Rules on the ground that the Eighth Circuit Court of Appeals appointed the undersigned counsel to represent Respondent Christopher Bohlen pursuant to the Criminal Justice Act.

Respectfully Submitted,

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No. 92-1510

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

MICHAEL J. CAVANAUGH, EXECUTIVE DIRECTOR OF THE SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES; AND SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE AND PARDON SERVICES,

PETITIONERS,

versus

GARY LEE ROLLER,

RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF ON THE MERITS

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35 pp

QUESTIONS PRESENTED FOR REVIEW

I. May a state prisoner challenging the denial of timely parole hearings seek injunctive relief under 42 U.S.C. §1983, or must relief be sought under 28 U.S.C. §2254?

II. Does the retrospective application of a statute increasing from one to two years the time period for parole consideration violate the *Ex Post Facto* Clause of the United States Constitution?

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STATEMENT OF THE CASE

The Respondent/Plaintiff, Gary Lee Roller, (hereinafter Roller), was convicted in Chester County, South Carolina, Court of General Sessions, of the crimes of Voluntary Manslaughter and Grand Larceny, said crimes occurring on December 13, 1982. Roller was sentenced on March 25, 1983, to thirty (30) years for the crime of Voluntary Manslaughter and five (5) years for the crime of Grand Larceny. The law in effect at the time of his crimes and sentencing required annual reconsideration of parole if Roller was denied parole on his original eligibility date. (J.A. 6). In 1986, the State amended the parole statute to provide that violent offenders would be reconsidered for parole every two years after initial rejection. (J.A. 7). Roller was initially considered and rejected for parole on October 27, 1990. The letter of rejection stated that he would be eligible for reconsideration on or about October 27, 1992, in accordance with the state law passed in 1986.

Prior to the administrative determination by the Petitioners as to Roller's reconsideration date, the South Carolina Supreme Court decided in *Gunter v. State*, 298 S.C. 113, 378 S.E.2d 443 (1989), that the retrospective application of the change in the parole law was not in violation of the *Ex Post Facto* Clause.

On December 28, 1990, Roller filed a Complaint under 42 U.S.C. §1983 in the District Court for the District of South Carolina seeking injunctive and monetary relief. (J.A. 2-11). The Honorable Henry M. Herlong, Jr., United States District Judge, issued an Order, filed November 8, 1991, granting the State's Motion for Summary Judgment. (J.A. 23-26). Roller appealed the District Court's ruling with regard to the denial of prospective injunctive relief. The Fourth Circuit Court of Appeals reversed the District Court and granted Roller the injunctive relief requested in its opinion of January 15, 1993. (J.A. 28-36). Thereafter, the State of South Carolina petitioned this Court for certiorari as the Fourth

Circuit ruling conflicted with the South Carolina Supreme Court's ruling in *Gunter v. State*. Certiorari was granted in this Court's Order of May 24, 1993.

Since this Court granted certiorari, the South Carolina Supreme Court has overruled its decision in *Gunter v. State*. In *Griffin v. State*, Opin. No. 23909 (July 19, 1993), the South Carolina Court held the change in parole reconsideration hearings under the Omnibus Crime Act of 1986, when applied to inmates such as Roller and Griffin, is violative of the *Ex Post Facto* Clause of the Constitution. In *Griffin*, the South Carolina Court adopted the reasoning of the Fourth Circuit's opinion in *Roller*.

SUMMARY OF THE ARGUMENT

The first issue raised is jurisdictional in nature and calls for this Court to determine whether a prisoner may challenge the denial of timely parole hearings under 42 U.S.C. §1983. As a hearing seeking parole neither assures Roller of release, nor involves any change in the length of his sentence, §1983 is a proper avenue for relief. The exclusive remedy provisions of *Preiser v. Rodriguez*, 411 U.S. 475 (1973), apply only to cases in which immediate release or reduction in length of confinement is sought. If the remedy sought relates to process rather than outcome, then the provisions of 28 U.S.C. §2254 do not preempt jurisdiction under §1983. As a ruling in Roller's favor on the underlying action will not entitle him to release, §1983 is a proper procedural alternative to vindicate his constitutional rights.

The second issue requires interpretation of the *Ex Post Facto* Clause of the Constitution. Roller was sentenced at a time when the statutory law of South Carolina

provided that upon initial rejection for parole he would be considered for parole every twelve months thereafter. In 1986, the parole law was changed to provide that the reconsideration hearings were to be held every twenty-four months rather than every twelve months. The State chose to apply the new statute to inmates sentenced prior to 1986. Under the guidelines of *Calder v. Bull*, 3 Dall. 386 (1798), and *Collins v. Youngblood*, 497 U.S. 37 (1990), the application of the subsequent statute to Roller violates *Calder* in that it "*changes the punishment*, and inflicts *a greater punishment*, than the law annexed to the crime, when committed." *Calder* at 390, [emphasis in original]. The State's categorization of the change as "procedural" is not relevant to the determination as the retrospective application of the statute goes to substantive aspects of the sentence imposed upon Roller, and "penal provisions accorded by the grace of the legislature" are equally entitled to the protection of the *Ex Post Facto* Clause as the actual sentence imposed. *Weaver v. Graham*, 450 U.S. 24, 30

(1981). Even though Roller may never be accorded the grace of parole during his term of imprisonment, the retrospective application of the statute restricting his opportunity to seek parole is more harsh than the law at the time of his sentencing and therefore "makes more burdensome" the punishment for his crime.

I.

AS THE RESPONDENT IS NOT ATTACKING THE FACT OR LENGTH OF HIS CONFINEMENT, NOR SEEKING AN IMMEDIATE OR MORE SPEEDY RELEASE, 42 U.S.C. §1983 IS AN APPROPRIATE REMEDY TO SEEK INJUNCTIVE RELIEF.

If Roller were seeking his release from custody, or a reduction in his sentence in order to gain an earlier release, his only avenue to obtain such relief would lie in habeas corpus. In the case at hand, Roller seeks injunctive relief for the sole purpose of obtaining an annual parole reconsideration hearing. Such a hearing would only give Roller the opportunity to seek parole which, in no way, is a guarantee of release. "That the state holds out the *possibility* of parole provides no more than a mere hope that the benefit will be obtained." *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 11 (1979) (citing *Board of*

Regents v. Roth, 408 U.S. 564, 577 (1982)) [emphasis in original]. This "mere hope" of release is the determinant factor in deciding whether Roller may proceed under §1983 or is limited to habeas corpus relief.

Under *Preiser v. Rodriguez*, 411 U.S. 475 (1973), the fact or duration of incarceration may not be challenged under 42 U.S.C. §1983. Roller does not challenge this general principle. The State, however, extends this qualification far beyond *Preiser* and its progeny. *Preiser* established the "extent to which §1983 is a permissible alternative to the traditional remedy of habeas corpus." 411 U.S. at 500. When the relief sought is actual or speedier release, *Preiser* restricts the availability of the civil rights statute. "In short, Congress has determined that habeas corpus is the appropriate remedy for state prisoners attacking the validity of the fact or length of their confinement, and that specific determination must override the general terms of §1983." 411 U.S. at 490. Similarly, the question here is

whether the general language of §1983 is preempted by the specific provisions of 28 U.S.C. §2254.

The language of 28 U.S.C. §2254(a) provides in part:

> The Supreme Court, a justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus... only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

This language does not indicate that Congress intended this remedy to apply to constitutional complaints other than improper custody. As such, it does not preempt the general language of §1983 allowing a prisoner, challenging prison conditions and asserting denial of other constitutional rights, to proceed under §1983. *Preiser* at 498-499. The *Preiser* Court limited its holding to those cases in which plaintiffs did not seek damages, but only equitable relief which would result in their actual or speedier release.

This Court's rulings since have adhered to the *Preiser* parameters. *Wolff v. McDonnell*, 48 U.S. 539 (1974),

recognized that §1983 was a proper vehicle to challenge the procedures used in taking good time credits, although restoration of good time credits under §1983 was foreclosed by this Court's ruling in *Preiser*. This limitation, however, did not deprive the inmates of other relief under §1983.

> [D]etermination of the validity of the procedures employed ... as a predicate to a damages award would not be barred by *Preiser*; and because under that case only an injunction restoring good time improperly taken is foreclosed, neither would it preclude a litigant with standing from obtaining by way of ancillary relief an otherwise proper injunction enjoining the prospective enforcement of invalid prison regulations.

Wolff, 418 U.S. at 555.

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), pretrial detainees filed a §1983 class action suit challenging the Florida criminal procedure which allowed for pretrial detention without a judicial determination of probable cause. The suit sought injunctive relief and did not seek a release from custody.

Respondents did not ask for release from state

> custody, even as an alternative remedy. They asked only that the state authorities be ordered to give them a probable cause determination.... Because release was neither asked nor ordered, the lawsuit did not come within the class of cases for which habeas corpus is the exclusive remedy. *Preiser v. Rodriguez*, see *Wolff v. McDonnell*.

Gerstein, 420 U.S. at 107 n.6 [citations omitted].

Greenholtz v. Inmates of the Nebraska Penal & Corr. Complex, 442 U.S. 1 (1979), dealt with a substantially similar issue as that raised by Roller; whether constitutional concerns were violated by post-sentencing parole procedures. This Court reached the merits of the *Greenholtz* §1983 claim without mention of whether the suit was properly before the Court. As pursuing the action under §1983 is a jurisdictional matter, this Court would have *sua sponte* raised the issue and refused to consider the merits of the underlying claim. *Collins v. Youngblood*, 497 at 41.

Under the State's reasoning, *Greenholtz* should have been dismissed. The basis of the inmates claim was that "they had been unconstitutionally denied parole...." 442 U.S.

at 3. As such, the *Greenholtz* plaintiffs, had they been successful, may have had an increased opportunity for release on parole. The fault in Petitioner's argument is that the State fails to distinguish between claims focusing on procedure and those focusing on the outcome of litigation. *Gerstein v. Pugh*'s holding that pretrial detainees were entitled to fair and impartial probable cause determinations could have led to the release of some plaintiffs from pretrial detention. This fact did not limit the detainees to habeas corpus relief as the remedy sought was a fair hearing and not release. "[T]he fact that a prisoner's success in the litigation might increase the chance for early release does not, in itself, transform the action into one for habeas corpus." *Georgevich v. Strauss*, 772 F.2d 1078, 1087 (3rd Cir., *en banc* 1985) (citing *Wright v. Cuyler*, 624 F.2d 455 (3d Cir. 1980)).

The question is one of process as opposed to outcome. When an inmate is challenging the procedures applied as violative of the Constitution, and not seeking actual

release, §1983 is an appropriate vehicle. In *Georgevich*, the Circuit Court considered a constitutional challenge to parole procedures on equal protection grounds and found the process versus outcome distinction determinative of which claims are properly under §1983 and which are restricted to habeas corpus. After reviewing this Court's decisions in *Preiser*, *Wolff*, *Gerstein* and *Greenholtz*, the Third Circuit found "the distinction [to be] between process-based claims and those focusing on the outcome of a particular decision. Since plaintiff's claim relates only to process and not to the actual duration of confinement, we hold that it could properly be brought as a §1983 action." *Georgevich*, 772 F.2d at 1087. Roller agrees with the Third Circuit that "analysis of the relief sought is necessary to determine whether exhaustion of state remedies is required." *Georgevich v. Strauss*, 772 F.2d at 1086.

Roller does not challenge the legality, fact or duration of his confinement. What is challenged is the process

by which the State has denied Roller hearings to which he was formerly entitled. If Roller is successful in obtaining the injunctive relief requested, the ultimate effect of yearly hearings on his ability to obtain parole is unknown. Obtaining yearly as opposed to bi-yearly hearings does not in any way guarantee him a speedier release from prison. This Court's decision on the merits of this action will not divest the parole board of its sole authority to decide if Roller is to be released. Therefore, Roller is not asking this Court to provide him with a speedier release, but with an opportunity to be considered for release under the circumstances as they existed at the time of his crime and sentencing.

While Roller makes no assertion that he is entitled to parole now or at any time in the future, the Fourth Circuit Court's decision makes it clear that he should not expect such relief. "Our decision does not, of course, require or even suggest that Roller be paroled. South Carolina need never parole him, so long as it considers the question every

year." *Roller v. Cavanaugh*, 984 F.2d 120, 124 (4th Cir. 1993). Simply put, release for Roller is "neither asked nor ordered" under his §1983 action. *Gerstein*, 420 U.S. at 107 n. 7. The Fourth Circuit Court of Appeals correctly decided this issue and Roller's action is properly brought under §1983.

Petitioner also argues that Roller should have first sought redress in the South Carolina State Courts before asking for federal relief. While exhaustion of state remedies may be necessary for habeas purposes, the same is not true of §1983 actions. *Patsy v. Board of Regents*, 457 U.S. 496 (1982).

II.

THE RETROSPECTIVE APPLICATION OF A STATUTE INCREASING THE TIME PERIOD FOR CONSIDERATION FOR PAROLE FROM ONE TO TWO YEARS "INFLICTS A GREATER PUNISHMENT" FOR A CRIME AND VIOLATES THE *EX POST FACTO* CLAUSE OF THE CONSTITUTION.

The Fourth Circuit found that "South Carolina has undoubtedly applied its new statute to 'alter the conditions - of...[Roller's] preexisting parole eligibility.'" *Roller v. Cavanaugh*, 984 F.2d at 124 (citing *Fender v. Thompson*, 883 F.2d 303, 306 (4th Cir. 1989)). Based upon the established general rule in the Fourth Circuit that changes in parole eligibility after the commission of the crime are in violation of the *Ex Post Facto* Clause, the Circuit Court found a violation of the Constitution in Roller's case. This decision conforms with the long standing rules of this Court as to the *ex post facto* prohibition and is consonant with the tradition of this

venerable precept.

In *Calder v. Bull*, 3 Dall. 386 (1798), Justice Chase engaged in a lengthy discussion of the differences between *ex post facto* and retrospective laws. 3 Dall. at 391-393. While indicating that both categories are "generally unjust; and may be oppressive," *Calder* at 391, he found that only penal laws fall "within the *words* and the *intent* of the prohibition." *Calder* at 390 [emphasis in original]. The term *ex post facto* was in use "long before the Revolution, and had acquired an appropriate meaning, by *Legislators*, *Lawyers*, and *Authors*." *Calder* at 391 [emphasis in original]. Justice Chase found this meaning to encompass four categories:

> 1st. Every law that makes an action done before the passing of the law, and which was *innocent* when done, criminal; and punishes such action. 2d. Every law that *aggravates* a *crime*, or makes it *greater* than it was, when committed. 3d. Every law that *changes the punishment*, and inflicts *a greater punishment*, than the law annexed to the crime, when committed. 4th. Every law that alters the *legal* rules of *evidence*, and receives less, or different, testimony, than the law required at the time of the commission of the offence, *in order*

to convict the offender.

Calder at 390 [emphasis in original].

These precepts were found to be consistent with commentaries of Sir William Blackstone who "considers an *ex post facto law* precisely in the *same* light I have done." *Calder* at 391 [emphasis in original]. While the accuracy of the historical discussion in *Calder* has been debated, this Court has faithfully adhered to the general principles espoused by the Justices in that case. *See*, *Collins v. Youngblood*, 497 U.S. 37, 41 n. 2 (1990).

This Court has, on a number of occasions, revisited the meaning of the *ex post facto* provisions. Of these cases, this Court has found that *Beazell v. Ohio*, 269 U.S. 167 (1925), "is faithful to our best knowledge of the original understanding of the *Ex Post Facto* Clause." *Collins v. Youngblood*, 497 U.S. 37, 43 (1990). In the 127 years between *Calder* and *Beazell*, this Court, on a number of occasions, found retrospective penal laws did not violate the *ex*

post facto doctrine. In *Beazell*, Justice Stone reviewed these opinions and found that there was substantial precedent for the principle but there was no bright line test to determine when a procedural change violated the Constitution.

> But it is now well settled that statutory changes in the mode of trial or the rules of evidence, which do not deprive the accused of a defense and which operate only in a limited and unsubstantial manner to his disadvantage, are not prohibited.... Just what alterations of procedure will be held to be of sufficient moment to transgress the constitutional prohibition cannot be embraced within a formula or stated in a general proposition. The distinction is one of degree. But the constitutional provision was intended to secure substantial personal rights against arbitrary and oppressive legislation, and not to limit the legislative control of remedies and modes of procedure which do not affect substantial rights.

269 U.S. at 170-171 [citations omitted].

Examples given of retrospective changes which do not violate the prohibition are the qualification of convicted felons as witnesses, *Hopt v. Utah*, 110 U.S. 575 (1884); allowing evidence which had been previously held inadmissable, *Thompson v. Missouri*, 171 U.S. 380 (1898);

changing the place of trial, *Gut v. Minnesota*, 9 Wall. 35, 19 L.Ed. 573 (1870); and changing the mode of execution, *Malloy v. South Carolina*, 237 U.S. 180 (1915).

The degree of the distinction is illustrated by comparing the ruling in *Malloy* with *Ex Parte Medley*, 134 U.S. 160 (1890). In both cases the defendant was under a valid sentence of death. In *Medley*, the retrospective statutory change added a requirement of solitary confinement prior to execution, in *Malloy* the method of execution was changed from hanging to death by electrocution. As this Court found that solitary confinement was "an additional punishment of the most important and painful character," *Medley*, 134 U.S. at 171, his punishment was found to be in violation of the Constitutional protection. On the other hand, in *Malloy*, the Court found that the change from hanging to electrocution was, if anything, a more humane method of producing death and "some of the odious features incident to the old method [hanging] were abated." *Malloy*, 237 U.S. at 185. Therefore,

the statutory change in *Malloy* did not violate the prohibition. The distinction between the cases turns upon the issue of whether the new statute makes more harsh the *punishment* being imposed. If it does, then it violates the *Ex Post Facto* Clause; if it does not then there is no violation.

This Court revisited the "procedural" question in *Collins v. Youngblood*, *supra*.

> Several of our cases have described as "procedural" those changes which, even though they work to the disadvantage of the accused, do not violate the *Ex Post Facto* Clause. While these cases do not explicitly define what they mean by the word "procedural," it is logical to think that the term refers to changes in the procedures by which a criminal case is adjudicated, as opposed to changes in the substantive law of crimes.

497 U.S. at 45 [citations omitted].

This Court found an element of confusion had been fostered by a number of cases which accorded protection to procedural changes which affected "matters of substance" or "arbitrarily infring[ed] upon 'substantial personal rights.'" *Id.* By returning to the original concept of *Calder*, the Court indicated

that *ex post facto* violations should be founded upon the categories set forth by Justice Chase. By whatever designation given a retrospective penal change, if it involves one of the four *Calder* categories, and is detrimental to the defendant, it violates the *Ex Post Facto* Clause.

> We think the best way to make sense out of this discussion in the cases is to say that by simply labelling a law "procedural," a legislature does not thereby immunize it from scrutiny under the *Ex Post Facto* Clause. Subtle *ex post facto* violations are no more permissible than overt ones....But the prohibition which may not be evaded is the one defined by the *Calder* categories.

Collins, 110 S.Ct at 2721 [citations omitted].

The question becomes whether an increase from one to two years in parole consideration after initial rejection is encompassed in the *Calder* categories. The Petitioner ignores this aspect of *Collins* and focuses an argument to whether the change is "substantial." While Roller maintains that the change in his case is substantial, the Respondent believes the proper inquiry lies in the nature of the deprivation.

The Petitioner focuses on the "substantial protections" and "personal rights" issues in arguing that Roller is not protected by the constitutional prohibition. Such inquiry is inconsistent with the effort of the Court in *Collins* to clear up the confusion engendered by these phrases and refocus the analysis to the *Calder* categories. *Collins*, 497 U.S. at 45-46.

While Roller's total sentence has not been changed, his opportunity to seek his release, pursuant to a procedure mandated by the law at the time of his sentence, has been altered. While a State has no obligation to employ parole, good time, or work credits, once these benefits are granted by legislation, they are entitled to *ex post facto* protection. "Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offence." *Weaver v. Graham*, 450 U.S. 24, 30-31 (1981).

The Petitioner argues that there has been no

change in the sentence imposed upon Roller. While Roller's thirty-five year sentence has not been changed, this fact does not end the inquiry. In *Weaver*, this Court found that the retrospective change in gain time credits to the inmate's detriment, while outside of the sentence imposed, was a change in "the quantum of punishment." 450 U.S. at 33 (quoting *Dobbert v. Florida*, 432 U.S. at 293-294). Similarly Roller has suffered a change in his punishment, and the retrospective application of the statute at issue here falls squarely under the *Calder* categories.

In *Weaver*, the issue as to the effect of the retrospective change was a close one. The gain time statute was amended to reduce the amount of gain time for good behavior but increased the opportunity for discretionary gain time. Then Justice Rehnquist, concurring in the judgment, indicated that he was "persuaded in this case, albeit not without doubt, that the statute is more onerous than the old." 450 U.S. at 38. The significance of the resolution of this issue in the

inmate's favor is that the Petitioner's argument as to "substantial deprivation" misses the point. If there is no dispute as to the detrimental effect of the statute, then the inquiry ends.

Roller's entitlement to annual parole hearings after reaching his parole eligibility date was statutory law in South Carolina at the time of his crime and sentencing. As such, it was a "part of the law annexed to the crime at the time" of his offense. *Roller v. Cavanaugh*, 984 F.2d at 122 (quoting from *Schwartz v. Muncy*, 834 F.2d 396, 398 n. 8 (4th Cir. 1987)). Changing the law to require Roller to serve at least one additional year before parole reconsideration is a change in the quantum of punishment. "We are not willing to disparage the 'substance' of a year, especially a year in prison." *Roller* at 123. This change, while couched by the State as "procedural," does not affect some procedure concerning Roller's trial nor can it be said that it simply changes the manner in which the State is imposing the

punishment.

The fact that there is no guarantee that yearly reviews would make any difference in Roller's ultimate release date does not diminish the constitutional error of the State's action. In the case of *Lindsey v. Washington*, 301 U.S. 397 (1937), the petitioner committed a burglary at a time when there was a minimum sentence of six months and a maximum sentence of fifteen years. At the time of sentencing the law had changed to provide for a mandatory fifteen year sentence. This Court found the application of the mandatory sentence to Lindsey to be violative of *ex post facto*. Although Lindsey could have been sentenced to fifteen years under the original statute, such a sentence was not mandated.

> It is true that petitioners might have been sentenced to fifteen years under the old statute. But the *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer...

> We need not inquire whether this is technically an increase in the punishment annexed to the crime. It is plainly to the substantial disadvantage of the petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the fifteen-year sentence.

Lindsey v. Washington, 301 U.S. at 401-402.

While Roller may never be paroled, the proper test is whether his *opportunity* to seek release is being adversely affected. Without question Roller is being denied *all opportunity* to seek his release for the one year period after the anniversary of his parole eligibility.

Petitioner argues that there is a distinction between initial parole eligibility and subsequent hearing dates. That somehow once eligibility is reached, changing the dates for consideration for release does not disadvantage Roller. The Fourth Circuit rejected this argument finding that "[e]ligibility without consideration is cold comfort." *Roller*, 984 F.2d at 123. Although the two may be technically different, Petitioner's argument calls to mind the *Collins*' admonition that

"[s]ubtle *ex post facto* violations are no more permissible than overt ones." 497 U.S. at 46. This position also assumes that the opportunity to secure release is not a matter of substance. As a practical matter, no typical inmate could reasonably be expected to distinguish between the initial eligibility and subsequent consideration for parole. In each situation a hearing is the only means by which the inmate may obtain release. The Fourth Circuit Court of Appeals correctly held that the distinction was irrelevant for the purposes of the *ex post facto* clause.

To argue that the disadvantage to Roller imposed by South Carolina's Omnibus Crime Bill is insubstantial and therefore constitutional flies in the face of the purpose and spirit of the *ex post facto* clause. A retrospective increase in the burden of punishment is constitutionally prohibited.

The retrospective application of the 1986 parole provisions to Roller is in violation of the *Ex Post Facto* Clause of the Constitution. The change is penal in nature, is being

applied retrospectively, is contained within the *Calder* categories, and is to the detriment of the Respondent. While the states should be encouraged to fashion and implement changes in rehabilitative programs to foster improved correctional practices, such changes should not be at the expense of time honored constitutional principles. There is room in our society for both.

CONCLUSION

FOR THE FOREGOING REASONS, the Respondent, Gary Lee Roller, prays that this Honorable Court affirm the judgment of the Fourth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED, this the 9th day of August, 1993, in Columbia, South Carolina.

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Supreme Court, U.S.
FILED
SEP 8 1993
OFFICE OF THE CLERK

No. 92-1510

In The

Supreme Court of the United States

October Term, 1993

MICHAEL J. CAVANAUGH, Executive Director of the South Carolina Department of Probation, Parole, and Pardon Services; SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES,

Petitioners,

vs.

GARY LEE ROLLER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

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No. 92-1510

In The

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October Term, 1993

MICHAEL J. CAVANAUGH, Executive Director of the South Carolina Department of Probation, Parole, and Pardon Services; SOUTH CAROLINA DEPARTMENT OF PROBATION, PAROLE, AND PARDON SERVICES,

Petitioners,

vs.

GARY LEE ROLLER,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

PETITIONERS' REPLY BRIEF ON THE MERITS

SUPPLEMENT TO THE STATEMENT OF THE CASE

Parole eligibility has always been set by statute in South Carolina, and it is simply not at issue here. What is at issue is the frequency of parole reconsideration hearings after a parole rejection. And this, we believe, makes all the difference.

Prior to June 15, 1981, the frequency between parole hearings was determined by policy of the South Carolina

Parole Board on the basis of sentence length, rather than by any statute. That policy was this:

sentence length	**frequency of reconsideration hearings upon parole rejection**
30 yrs or more	24 months
25 yrs but less than 30 yrs	21 months
20 yrs but less than 25 yrs	18 months
15 yrs but less than 20 yrs	15 months
less than 15 yrs	12 months

On June 15, 1981, the General Assembly of South Carolina enacted legislation governing the frequency of parole reconsideration hearings upon a rejection for parole. The 1981 law required parole reconsideration hearings annually for all inmates eligible for parole.

On June 3, 1986, the legislature further amended the law regulating the frequency of parole reconsideration hearings. The 1986 amendment first defined certain crimes as violent. Then it changed the procedure so that inmates who had been convicted of a violent crime and who were eligible for parole on their sentence would be reconsidered for parole after two years following a rejection. Inmates serving sentences for non-violent crimes would continue to have annual parole reconsideration hearings. This 1986 amendment was applied retroactively. In 1989, the South Carolina Supreme Court ruled that the retroactive application of the law providing for parole reconsideration after two years did not violate the *Ex Post Facto* Clause of the Constitution. *Gunter v. State*, 298 S.C. 113, 378 S.E.2d 443 (1989).

On January 15, 1993, the United States Court of Appeals for the Fourth Circuit ruled, contrary to *Gunter, supra*, that the retroactive application of the two-year wait between parole reconsideration hearings did violate the *Ex Post Facto* Clause. This Court then granted certiorari.

On July 19, 1993, the South Carolina Supreme Court reversed its decision in *Gunter, supra*, in *Griffin v. State*, Opinion Number 23909 (July 19, 1993) (Appendix to Reply Brief 1).

ARGUMENT

I. The United States Supreme Court's jurisdiction is unaffected by the South Carolina Supreme Court's decision in *Griffin v. State*, Op. No. 23909 (July 19, 1993) because the South Carolina Supreme Court based its decision upon federal law as interpreted by the United States Court of Appeals for the Fourth Circuit.

The decision in *Griffin v. State* is based upon federal law:

> The Fourth Circuit's analysis is compelling. It is difficult to determine where the difference lies between a review once every two years and once every eight years. This gray area tortures the *ex post facto* analysis between a change in the standards for review and a procedural change in timing. The *Akins* Court, [922 F.2d 1558 (11th Cir. 1991), *cert. denied*, 111 S.Ct. 2915 (1991)] was faced with a statute that provided for a procedural change which effectively changed the standards for parole. We must now acknowledge that where a procedural rule is so overly

> intrusive that it substantively effects [sic] the review standard, it then becomes an *ex post facto* violation. In adopting the Fourth Circuit's holding in *Roller*, we overrule our holding in *Gunter*, 298 S.C. 113, 378 S.E.2d 443 (1989).

It is patently clear that the South Carolina Supreme Court's decision is not based on any independent or adequate state ground. The *Griffin* opinion rests primarily upon *Roller v. Cavanaugh*, 984 F.2d 120 (4th Cir. 1993) and its reasoning.

This Court retains jurisdiction to review a state-court decision where it appears "that the state court decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983). The *Griffin* decision does not render a decision by this Court moot since the *Griffin* decision is clearly predicated on the decision of the Fourth Circuit now before this Court.

II. Because he seeks a speedier release from prison, Roller may not proceed in federal court under 42 U.S.C. § 1983; he must first exhaust his state-court remedies through habeas corpus

To support his argument that he is entitled to proceed under 42 U.S.C. § 1983, Roller claims that his procedural due process has been violated. To come within reach of § 1983 he denies outright that what he is seeking is a speedier release, and he focuses on procedure. But the jurisdictional question cannot be answered in the way Roller would have this Court ask it. The question is whether or not Roller's challenge of South Carolina's

procedure really amounts to an attempt to gain an immediate or speedier release. Since Roller seeks more frequent hearings, he seeks a speedier release. The fact that he has a hope of release on parole but not a right to parole does not alter the nature of his claim. He attacks the procedure in order to win a speedier release. He should not be permitted, therefore, to pursue his claim under § 1983. He must proceed under habeas corpus. And he must exhaust his remedies in the state courts of South Carolina. Roller cannot avail himself of § 1983 simply by claiming that he is entitled to parole. The Fourth Circuit's statement to the contrary ignores the fact that Roller is challenging a procedure in order to obtain speedier release. *Roller v. Cavanaugh*, 984 F.2d 120 (4th Cir. 1993).

III. The retroactive application of the South Carolina law requiring two years between parole consideration hearings does not deprive Roller unconstitutionally of a meaningful opportunity to be considered for parole.

Roller argues that the frequency of parole consideration hearings is a part of the punishment. He is wrong about this. And his error leads ineluctably to a patent absurdity: any tampering with parole procedure amounts to a tampering with a substantive right, so that finally no state legislature may ever change its parole procedures and then apply those procedures after the fact without violating the *ex post facto* prohibition. Under Roller's view, states are left with almost no room to experiment with their parole procedures.

In support of his position, Roller relies on the Fourth Circuit's statement that "South Carolina has undoubtedly applied its new statute to "alter the conditions of . . . [Roller's] preexisting parole eligibility." *Roller v. Cavanaugh*, 984 F.2d at 124 (citing *Fender v. Thompson*, 883 F.2d 303, 306 (4th Cir. 1989). We see precisely here the basic flaw in the Fourth Circuit's reasoning and in Roller's argument: the equation of parole eligibility with parole reconsideration. The Fourth Circuit's and Roller's conclusion that South Carolina has in effect altered its laws on parole eligibility is simply wrong. The law that determines parole eligibility remains unchanged. In South Carolina, parole eligibility annexes at the time of the crime. The frequency of parole hearings once an inmate becomes eligible for parole and is rejected for parole, however, is altogether another matter. To equate the frequency of parole hearings in South Carolina with parole eligibility misunderstands South Carolina's law and conveniently avoids deciding the issue on its merits.

Petitioners rely upon *Rodriguez v. U.S. Parole Commission*, 594 F.2d 170 (7th Cir. 1979). This was a habeas corpus action challenging a change in the frequency of parole consideration hearings. *Rodriguez* says that once a parole system has been created, inmates subject to that system are entitled to a meaningful parole hearing. Failure to provide that meaningful parole hearing denies a federal constitutional right. Under the facts in *Rodriguez*, the change at issue required a parole hearing upon entering prison and a second hearing at or near the expiration date of the sentence. Prior to the change, a parole hearing would be conducted at the one-third point in the offender's sentence. The *Rodriguez* Court held the parole

hearing at the one-third point to be meaningful. The change in procedure required a hearing at the beginning of the sentence and at the end of the sentence, but not at the one-third point. The Court held that the hearing at the end of the sentence was not meaningful. The Court then concluded that the change in the parole reconsideration procedure resulted in the denial of a substantial right – the right to a meaningful parole hearing during the inmate's active sentence. This change, the court held, made the punishment more burdensome after the commission of the crime. *Beazell v. Ohio*, 269 U.S. 167 (1925). Therefore, the change violated the *Ex Post Facto* Clause. The holding in *Rodriguez* is consistent with *Collins v. Youngblood*, 497 U.S. 37 (1990), in which the Court held that a change in procedure must be of such moment as to cause a denial of a substantial personal right, before it can be said to create a constitutional problem under the *Ex Post Facto* Clause.

In Roller's case, there has been no retroactive denial of the opportunity for a meaningful parole hearing before the expiration date of his sentence. He is reconsidered for parole every two years, instead of every year. This may be somewhat of a disadvantage, but it is certainly not so great a disadvantage as to deny him a substantial personal right. Although the frequency of Roller's parole hearings has in fact been decreased, every such procedural change does not violate the Constitution, even if it does marginally disadvantage the inmate. *Dobbert v. Florida*, 432 U.S. 282 (1977).

CONCLUSION

Roller should not be allowed to bring this action under 42 U.S.C. § 1983. Notwithstanding his attempt to frame the question in terms of procedure alone, what he seeks is a speedier release, and that fact forecloses federal jurisdiction under § 1983. But even if the Court should find that federal jurisdiction is properly founded on § 1983, Roller's *Ex Post Facto* claim must fail on the merits. For his claim is meritless. The changes to the South Carolina parole procedure do not deny Roller a substantial personal right. The Fourth Circuit would therefore be properly reversed in this case. We ask the Court to do so.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In the Supreme Court

Roger D. Griffin, Respondent,

v.

State of South Carolina, Petitioner.

Appeal From York County
John C. Hayes, III, Judge

Opinion No. 23909
Submitted April 20, 1993 – Filed July 19, 1993

AFFIRMED

Attorney General T. Travis Medlock, Chief Deputy Attorney General Joseph D. Shine and Assistant Attorneys General Delbert H. Singleton, Jr. and Lisa Godwin Jefferson, all of Columbia, for Petitioner.

Assistant Appellate Defender Robert M. Pachak, of SC Office of Appellate Defense, of Columbia, for Respondent.

TOAL, A.J.: The State appeals from an order granting Respondent's application for post-conviction relief. We AFFIRM.

Facts

The Respondent, Griffin, was indicted for murder in April 1984. On May 21, 1984, Griffin appeared before the

court and entered a plea of guilty to voluntary manslaughter. Prior to the acceptance of the plea, the trial judge conducted a lengthy colloquy to determine the voluntariness of the plea. At the conclusion of the judge's questioning, the plea was accepted and Griffin was sentenced to thirty years imprisonment. Griffin did not appeal his guilty plea or sentence.

On July 1, 1991, Griffin filed an Application for Post-Conviction Relief. In his application, Griffin alleged, inter alia, that the State's application of the Omnibus Crime Bill, specifically the change from an annual review for parole eligibility to a biannual review, violated the *ex post facto* clause of the South Carolina and United States Constitutions. The PCR judge found that Griffin relied upon the annual review for parole eligibility in his decision to plead guilty, and that Griffin's constitutional rights under the *ex post facto* clause were violated. We granted the State's petition for certiorari to review the PCR court's order.

Law/Analysis

The State raises two issues on appeal. The first and pivotal issue is whether the PCR judge erred in ruling that Griffin suffered a violation of the *ex post facto* clause. The second issue is whether the PCR judge erred in finding that Griffin's plea of guilty to voluntary manslaughter was not knowingly, voluntarily, and intelligently entered.

We addressed this first issue in *Gunter v. State*, 298 S.C. 113, 378 S.E.2d 443 (1989). In *Gunter*, the applicant for post-conviction relief raised an *ex post facto* challenge

to the change in parole eligibility review. *Id.* After examining the question, we held that:

> the standards governing petitioner's parole eligibility have not . . . changed. Instead, only the frequency with which petitioner can be reconsidered for parole has been altered. We find no ex post facto violation in the application of the questioned statute to petitioner.

Id. at 115-16, 378 S.E.2d at 444.

The PCR court distinguished *Gunter* on the grounds that Griffin had pled guilty and that Gunter was convicted at trial. This is not completely correct. While it is true Gunter was tried, convicted, and sentenced to thirty years for voluntary manslaughter, we reversed the conviction in *State v. Gunter*, 286 S.C. 556, 335 S.E.2d 445 (1985). On remand, Gunter pled guilty to voluntary manslaughter and received a thirteen-year sentence. Our PCR holding in *Gunter v. State*, 298 S.C. 113, 378 S.E.2d 443 (1989), was rendered while Gunter was serving the thirteen year sentence as a result of his plea of guilty.

Since *Gunter*, we have held that "[t]he *ex post facto* clause protects against retroactive legislative provisions which are disadvantageous to the offender. A mere procedural change in law, not increasing punishment or changing elements of the offense, does not result in an *ex post facto* violation." *Elmore v. State*, 305 S.C. 456, 459, 409 S.E.2d 397, 399 (1991); *see also Miller v. Florida*, 482 U.S. 423, 107 S. Ct. 2446, 96 L. Ed. 2d 351 (1987).

Respondent cites the recent Fourth Circuit decision in *Roller v. Cavanaugh*, 984 F.2d 120 (1993). In *Roller*, the Fourth Circuit Court of Appeals disregarded our decision

in *Gunter*, and held that the statutory amendment for review of parole eligibility was a violation of the *ex post facto* clause. The Fourth Circuit relied on *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991), which found an *ex post facto* violation in a Georgia statute that decreased the frequency of parole hearings from once a year to every eight years. Obviously the Georgia statute was an example of how a procedural change could be expanded to have a substantive effect.

The Fourth Circuit's analysis is compelling. It is difficult to determine where the difference lies between a review once every two years and once every eight years. This gray area tortures the *ex post facto* analysis between a change in the standards for review and a procedural change in timing. The *Akins* court was faced with a statute that provided for a procedural change which effectively changed the standards for parole. We must now acknowledge that where a procedural rule is so overly intrusive that it substantively effects the review standard, it then becomes an *ex post facto* violation. In adopting the Fourth Circuit's holding in *Roller*, we overrule our holding in *Gunter*, 298 S.C. 113, 378 S.E.2d 443 (1989).

In light of our holding today, we need not reach the second issue. Accordingly, for the reasons stated, the decision of the PCR court is AFFIRMED.

HARWELL, C.J., CHANDLER, FINNEY and MOORE, JJ., concur.

(SEAL)

The Supreme Court of South Carolina

CLYDE N. DAVIS, JR.
CLERK
BRENDA F. SHEALY
DEPUTY CLERK

P.O. BOX 11330
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August 17, 1993

The Honorable T. Travis Medlock
The Honorable Joseph D. Shine
The Honorable Delbert H. Singleton, Jr.
The Honorable Carl W. Stent
Office of the Attorney General
P. O. Box 11549
Columbia, S. C. 29211

Re: Roger D. Griffin v. State of South Carolina

Gentlemen:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing denied.

s/David W. Harwell C.J.
s/A. Lee Chandler A.J.
s/Ernest A. Finney, Jr. A.J.
s/Jean H. Toal A.J.
s/James E. Moore A.J.

August 17, 1993."

The remittitur in this matter is today being forwarded to the Clerk of Court for York County

Very truly yours,
/s/ Brenda F. Shealy
DEPUTY CLERK